SUPREME COURT OF THE UNITED STATES.

No. 323.

THE SAINT PAUL AND PACIFIC RAILROAD COMPANY, WILLIAM B. LITCHFIELD, AND R. H. FITZ, PLAINTIFFS IN ERROR,

vs.

CASPER H. SCHUREMAN. MILLER

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of Minnesota, before you, between Caspar H. Schurmeier, plaintiff, and the Saint Paul and Pacific Railroad Company, William B. Litchfield, and R. H. Fitz, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and
2 sixty-six, and of the independence of the United States the ninetieth year.

H. E. MANN,
Clerk of the Circuit Court of the United States for the District of Minnesota.

3 Filed January 27th, 1866.

A. McELRATH, *Dep. Clerk.*

4 UNITED STATES OF AMERICA, *ss:*

To Caspar H. Schurmeier, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington the 1st Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein the Saint Paul and Pacific Railroad Company, William B. Litchfield, and R. H. Fitz, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Wilson, chief justice of the said supreme court of the State of Minnesota, this 27th day of January, in the year of our Lord one thousand eight hundred and sixty-six.

THOMAS WILSON,
Ch. Just., Minnesota.

5 STATE OF MINNESOTA, *County of Ramsey, ss:*

Orlando Simons, of said county, being duly sworn, deposes and says that on the 27th day of January, 1866, he served a true copy of the answer and citation upon Lorenzo Allis, esqr., personally, who is personally known to deponent to be the attorney of Caspar H. Schurnier, the defendant in error named in said citation, and to whom the same is directed, by delivering the said copy to and leaving the same with the said Lorenzo Allis, at the city of Saint Paul, in said county of Ramsey, and State of Minnesota.

ORLANDO SIMONS.

Sworn to and subscribed before me, at Saint Paul, Ramsey county, Minnesota, this 27th day of January, 1866.

[SEAL.] A. McELRATH,
Dep. Clerk Sup. Court, Minnesota.

6 Service admitted this 27th day of January, 1866.

LORENZO ALLIS,
Att'y for Def't in Error.

Filed January 27th, 1866.

A. McELRATH, *Dep. Clerk.*

7 STATE OF MINNESOTA, *Supreme Court, ss:*

The judges of the said supreme court of the State of Minnesota answer to the writ of error hereto attached, and return to the honorable the Supreme Court of the United States thereupon as hereinafter follows and appears:

8 STATE OF MINNESOTA:

District court, second judicial district, county of Ramsey.

[U. S. revenue stamp, 50 cents.]

CASPAR H. SCHURMEIER
against
THE SAINT PAUL AND PACIFIC RAILROAD COMPANY, William B. Litchfield, and Rudolph H. Fitz.

The State of Minnesota to the above-named defendants:

You and each of you are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which has been filed with the clerk of this court, at his office, in the *the* court house, in the city of St. Paul, in the county aforesaid, and to serve a copy of your answer to the said complaint upon the subscriber at his office in the city of St. Paul, in the State aforesaid, within twenty days after the service of this summons on you, exclusive of the day of service, and if you fail to answer the said complaint within the time aforesaid, the said plaintiff will apply to the court for the relief demanded in said complaint.

LORENZO ALLIS,
Plaintiff's Attorney, St. Paul.

9 Indorsed as follows:

STATE OF MINNESOTA, *County of Ramsey, ss:*

I hereby certify that at the city of Saint Paul, in said county, on the 4th day of December, A. D. 1862, I served the within summons personally upon E. Rice, president of the St. Paul and Pacific Railroad Company, and William B. Litchfield, by delivering to and leaving with said Rice and Litchfield true and certified copies of said summons.

And I further certify that I served said summons personally on R. H. Fitz, at St. Paul aforesaid, on the 5th day of December, A. D. 1862, by delivering to and leaving with said Fitz a true and certified copy of said summons.

And I further certify that I know the persons served as aforesaid to be the persons mentioned and described in said summons as defendants therein, except Edmund Rice, whom I know to be the president of the said the St. Paul and Pacific R. R. Co., defendant.

D. A. ROBERTSON,
Sheriff of Ramsey County,
By JOHN GRACE, *Deputy.*

Filed Dec. 23d, 1862.

GEO. W. PRESCOTT, *Clerk.*

10 District court, second judicial district, county of Ramsey.

CASPER H. SCHURMEIER
against
THE ST. PAUL & PACIFIC RAILROAD COMPANY, William B. Litchfield, and Rudolph H. Fitz.

The complaint of Caspar H. Schurmeier, plaintiff in this action, against the Saint Paul and Pacific Railroad Company, William B. Litchfield, and Rudolph H. Fitz, defendants in this action, respectfully shows to the court—

That this plaintiff is now, and for a long time past has been, the owner and well seized in fee and in the actual possession and enjoyment of the following described real estate, together with its appurtenances, situate in the county of Ramsey, in the State of Minnesota, to wit, lots eleven (11) and twelve (12) in block twenty-nine (29) in the original town of St. Paul, according to the plat thereof on record in the office of the register of deeds for the county of Ramsey aforesaid. And that the aforesaid premises are of great value, to wit, of the value of twenty thousand dollars.

11 And that there is now erected and located on said premises a large and complete stone warehouse, which is of great value, and is now and for a long time past has been constantly in use as a warehouse, and as such yielding unto this plaintiff regular rents and profits in a large amount; and that said premises were purchased by this plaintiff at a great cost for the express purpose and with the ex-

press design of erecting stores and warehouses thereupon, and that said warehouse was erected by this plaintiff at great expense for the express purpose and with the express design of being occupied and used as a warehouse.

And that said premises front immediately upon the public street and levee, which runs along the bank of the Mississippi river in front of the city of St. Paul, and that said public street and levee constitutes and furnishes the regular and usual public landing at the port of said city of St. Paul of all steamboats and all other vessels and water craft navigating said river, and also the place where said vessels receive and discharge their freight and passengers.

12 And that said river is a deep and navigable public stream of water on which a large amount of commerce and trade are carried on between the said port of St. Paul and other ports and places situate on the said river and its tributaries, and that said river is deep and navigable immediately along and close up to its banks on and along which said street and levee are constructed and run, and especially immediately in front of this plaintiff's said premises.

And that said street and levee has been constructed and prepared at great expense for the express purpose of being used for said public landing, levee, and street, and are well adapted to that purpose, and were long ago duly set aside and dedicated to the public for said use and purpose, and have ever since been and are now in use and occupation as such public street, levee, and landing; and their use and occupation as such public street, levee, and landing are of great value and of indispensable necessity to the public and to the owners of property fronting on said street and levee, and especially to this plaintiff. And that the whole space between this plaintiff's

13 said premises and the bank of said river in front thereof is taken up and occupied with the said public street, levee, and landing, and that the said street, levee, and landing immediately in front of said premises is now used, and for a long time has been used, as a regular public landing, where steamboats and other vessels and water craft navigating the said river as aforesaid do moor and land and receive and discharge their freight and passengers, and that the same has been specially set aside, prepared, and constructed for that purpose, and is specially well adapted therefor; and the use and occupation thereof for said purpose is of great value and of indispensable necessity to the public generally, and specially to this plaintiff.

And that said plaintiff is now the owner of the fee of all said public street, levee, and landing in front of his said premises down to the waters of said river, subject only to the easement of the public use of said street, levee, and landing as aforesaid. And that the principal value of this plaintiff's said premises is in its frontage on said public street, levee, and landing, and the free use and occupation of said

14 street, levee, and landing for purposes aforesaid, and that without the free and unobstructed use and occupation of said street, levee, and landing as aforesaid, the said premises would be nearly or quite useless and valueless.

And this plaintiff further says that the said defendant, the St. Paul

and Pacific Railroad Company, is a body corporate created and established by the laws of the State of Minnesota, and organized and doing business in said State and by virtue of said laws, and more especially under and by virtue of a certain act of the legislature of said State, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad Company, and to amend and continue the act of incorporation relating thereto," approved the 19th day of March, A. D. 1862.

And that the said defendant has constructed a railway from the city of St. Paul to the city of St. Anthony in said State, and is now running cars thereon for the carriage and transportation of freight and passengers.

15 And that said defendant is now engaged in extending and constructing its said railway upon and along the aforesaid public street, levee, and landing, and especially immediately in front of this plaintiff's said premises, with the design and purpose of running their said cars on the same, and carrying and transporting passengers and freight thereon, and of so using and occupying said street, levee, and landing for all time to come. And that said defendants are now engaged in erecting and constructing and have nearly completed on said street, levee, and landing, and especially in front of said premises, their trestle-work, on which the track of their said railway is to be immediately laid and completed for use; and that said trestle-work is raised above the surface of said street, levee, and landing about six feet.

And that said railway track, and the said use and occupation of said street, levee, and landing by the said defendant as aforesaid, do now, and will for all time to come, if permitted, utterly obstruct and prevent the further use and occupation of said street, levee, and

16 landing for the purpose of a public street, levee, and landing as aforesaid, and will render this plaintiff's said premises untenable, useless, and valueless, or nearly so, and will nearly or quite destroy the use and value of said premises for any purpose whatever for all time to come, and will thus irreparably injure and damage this plaintiff.

And this plaintiff further says, that said defendant has never received from this plaintiff, nor from the city of St. Paul, nor from the said State of Minnesota, nor from the legislature thereof, nor from any person or persons, party or parties, nor from any source whatever, any license, authorization, grant, right, or permission to enter upon, possess, occupy, use, or hold said street, levee, and landing, or any part thereof, for any purpose whatever, nor during any period of time whatever, nor to construct said railway track, nor said trestle-work, nor do any other act or thing whatever in the premises; and that said defendant, in all matters aforesaid, and in all their said acts in the premises, are wholly and wilfully tresspassers, and are, moreover, a public nuisance.

And that said defendant, William B. Litchfield, is an employee of

17 the said the St. Paul and Pacific Railroad Company, and is superintendent of this said railway, and this plaintiff avers,

upon information and belief, that the aforesaid trespass and wrong is now being committed as aforesaid under the immediate supervision of the said Litchfield.

And that said defendant, R. H. Fitz, is an employee of said the St. Paul and Pacific Railroad Company, and is the contractor immediately employed in erecting and constructing said trestle-work.

And this plaintiff further says, that unless a writ of injunction issue out of and under the seal of this court restraining the said defendants, their officers, agents, attorneys, employees, and servants, and each and all of them, from in anywise entering upon, possessing, using, and occupying or holding said street, levee, or landing, or any part thereof, and especially that part thereof lying and being in front of this plaintiff's said premises, or from building or constructing their railway track thereon, or from erecting the said trestle-work thereon, or from running their cars thereon, or from otherwise using or obstructing said street, levee, or landing, or any part thereof, for the purpose of their said railroad as aforesaid, this plaintiff
18 will be irreparably injured.

Wherefore the said plaintiff demands judgment in his favor and against the said defendants, and each of them, adjudging and decreeing that the said defendants, their officers, agents, attorneys, employees, and servants, and each and every of them, be for ever restrained, by injunction issuing out of and under the seal of this court, from erecting or constructing any trestle-work, track, or other work on the street or levee or landing aforesaid, or any part thereof in front of said plaintiff's said premises, and from entering upon, using, or occupying the said street, levee, or landing, or any part thereof, for the purposes of said railroad, or for the purpose of erecting, constructing, or building thereupon any track, trestle-work, railway, or other work, and from running or using any cars or engines thereupon, and from anywise obstructing or impeding the free use of the said street, levee, or landing by the public. And this plaintiff may have such other and further judgment and relief in the premises as the nature of the case shall require, and as may be agreeable to
19 equity, together with his costs.

And, accordingly, this plaintiff demands that a temporary writ of injunction may issue out of and under the seal of this court in the premises, according to the rules and practice thereof, and that afterwards, and after all due proceedings had, a perpetual writ of injunction may also issue herein as prayed for.

LORENZO ALLIS,
Plff's Att'y, St. Paul.

STATE OF MINNESOTA, *County of Ramsey, ss:*

Caspar H. Schurmeier, of said county, being duly sworn, says that he is the plaintiff named in the foregoing complaint; that said complaint is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

CASPAR H. SCHURMEIER.

Subscribed and sworn to before me, this 3d day of December, A. D. 1862.

[SEAL.] HENRY L. WILLIAMS,
Notary Public, Ramsey Co., Minn.

20 Indorsed as follows:

"To the clerk of the district court, 2d judicial district:

"Let a writ of injunction, as prayed for in the within complaint, issue upon filing of the bond approved by me December 3, 1862.

"OSCAR MALMROS,
"*Court Commissioner, Ramsey Co., Minn.*

"Filed Dec. 3, 1862.

"GEO. W. PRESCOTT, *Clerk.*"

District court, second judicial district, Ramsey county.

CASPAR H. SCHURMEIER
against
THE SAINT PAUL AND PACIFIC RAILROAD COMPANY, William B. Litchfield, and Rudolph H. Fitz.

The answer of the above-named defendants in this action to the complaint of the plaintiff therein, respectfully shows to the court that the said plaintiff is not now and never has been the owner in fee or otherwise of the real estate described in said complaint, to wit: Lots eleven and twelve, in block twenty-nine, in the original town of Saint Paul, according to the plat thereof on record
21 in the office of the register of deeds of the county of Ramsey aforesaid, or any part or parcel thereof, except so much and that portion of the same as is north and west of the southerly or southeasterly line or lines of lot numbered one, of section five, in township twenty-eight north, of range twenty-two west, in the district of lands formerly subject to sale by the United States at the Falls of St. Croix, Wisconsin, according to the official survey of the same made under and by the authority of the United States, and the official plat of the survey of the same returned to the General Land Office of the United States by the surveyor general; said southerly or southeasterly line or lines of said lot, numbered one, being commonly called and known as the "meander line" of the left bank of the Mississippi river.

And that the said plaintiff is not now and never has been the owner in fee or otherwise of the land described in his said complaint as a public street and levee or landing, or any part thereof, and has not and never had any right, title, interest, or claim in or to the same, or in or to any land situate, lying, and being between said lots eleven and twelve, mentioned in his complaint, and the main channel
22 of the Mississippi river; and the said plaintiff has not and never had any right, title, interest, or claim in or to any part of the lands upon which the said defendants have entered as charged in said complaint.

And that there has never been any public street, levee, landing, or highway duly or lawfully set aside, laid out, granted, or dedicated to public use in front of said lots eleven and twelve, or between them and the Mississippi river, or at the place where the said defendants have constructed, or are constructing said trestle-work and railroad, or any part of the same south or east of said lot numbered one, of section five, in township twenty-eight aforesaid, as the same was surveyed and platted by the United States, or between the same and the Mississippi river.

And the said defendants, further answering, say that the whole and every part of the said lands, described in said complaint, upon which said defendants are therein charged to have entered and committed the acts therein complained of, and all of those parts and portions of said lots eleven and twelve, which are situate, lying, and being south and east of the southerly or southeasterly line or
23 lines of said lot one, section five, township twenty-eight north, of range twenty-two west, as the same was originally surveyed and run under and by the authority of the United States, and according to the official plat of the same, on record in the General Land Office of the United States, and all of the land between said lot numbered one and the meander line, so called, upon the right bank of the Mississippi river, are a part and parcel of the same lands and premises which were granted by the United States to the Territory and State of Minnesota, by an act of the Congress of the United States, entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory," approved March 3d, 1857, and which were granted by the said Territory and State of Minnesota to the said defendant, the Saint Paul and Pacific Railroad Company, to aid in the construction of the said Saint Paul and Pacific railroad, by the several acts of the legislature of the Territory and State of
24 Minnesota relating thereto, and the said Saint Paul and Pacific Railroad Company, by virtue of said grants and under and pursuant to said acts aforesaid, have entered upon and taken possession of the said premises last above described, for the purposes aforesaid, which are the same premises upon which the acts complained of in the complaint are alleged to have been committed.

And the said defendants, further answering, say that all the acts and things by them, or either of them done, threatened, or contemplated as charged in the complaint, were and are necessary to be done in order to construct, maintain, and operate the said railroad authorized to be constructed, maintained, and operated by the said defendant, the Saint Paul and Pacific Railroad Company, and to execute and fulfil the trusts reposed in said company by and on behalf of the United States and the Territory and State of Minnesota, in and by the statutes of the United States and of the Territory and State of Minnesota.

And the said defendants, Litchfield and Fitz, entered upon said premises and performed the acts complained of against them, by the

authority and in the employ of the said defendant, the Saint Paul and Pacific Railroad Company, for the purposes aforesaid.

25 Wherefore, the defendants demand judgment, and that this action be dismissed, and that they have judgment for their costs and disbursements.

MASTERSON & SIMONS,
Attorneys for Defendants, St. Paul, Minnesota.

STATE OF MINNESOTA, *Ramsey County, ss:*

Henry F. Masterson, of said county, being duly sworn, deposes and says that he is the attorney of the above-named defendant, the Saint Paul and Pacific Railroad Company, duly elected and authorized to act as such; that he has read the foregoing answer and knows the contents thereof; that he is familiar with all the material matters stated in said answer, and has actual knowledge thereof, and that the foregoing answer is true, of his own knowledge.

HENRY F. MASTERSON.
Attorney for St Paul and Pacific R. R. Co.

Subscribed and sworn to before me, this 15th day of Jan., 1863.
[SEAL.] JOHN H. RANDALL,
Notary Public, Ramsey Co., Minn.

Indorsed as follows: "Service of a copy of the within answer is admitted this 15th day of Jan., 1863.

26 "LORENZO ALLIS, *Pl'ff's Att'y.*

"Filed May 20th, 1863.

"GEO. W. PRESCOTT, *Clerk.*"

District court, second judicial district, county of Ramsey.

CASPER H. SCHURMEIER
against
THE ST. PAUL AND PACIFIC RAILROAD COMPANY, Wm. B. Litchfield, and Rudolph H. Fitz.

And now comes the plaintiff in this action, and for a reply to the statement of new matters contained in the answer of the defendant, denies each and every allegation thereof.

LORENZO ALLIS, *Att'y of Pl'ff.*

RAMSEY COUNTY, *ss:*

Casper H. Schurmeier, being duly sworn, says that he is the plaintiff named in the foregoing reply; that said reply is true, of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

CASPER H. SCHURMEIER.

Sworn to and subscribed before me, this 4th day of Febuary, A. D. 1863.

H. L. WILLIAMS,
Notary Public, Ramsey County, Minn.

27 Indorsed as follows: "Service of the within reply is admitted, this 4th day of Feb'y, 1863.
"MASTERSON & SIMONS, *Def't's Att'ys.*

"Filed February 4th, 1863.
"GEO. W. PRESCOTT, *Clerk.*"

STATE OF MINNESOTA,
County of Ramsey District Court, 2d Judicial District, ss:
General term, May, A. D. 1863.—Wednesday morning, 9 o'clock.
MAY 20TH, A. D. 1863.

Court opened pursuant to adjournment: Hon. E. C. Palmer, dist. judge, presiding.

C. H. SCHURMEIER
against
THE ST. PAUL AND PACIFIC RAILROAD COMPANY *et al.*

Ordered, by consent of parties in open court, that this cause be and it is referred to honorable Andrew G. Chatfield, who is hereby appointed sole referee, to hear and determine all the issues herein, and report a judgment to this court with all convenient speed.

A true record.
Attest: GEO. W. PRESCOTT, *Clerk.*
By SHERWOOD HOUGH, *Dept. Clerk.*

I hereby certify that the foregoing is a true transcript from
28 the minutes of court.
Attest: GEO. W. PRESCOTT, *Clerk.*
By SHERWOOD HOUGH, *Dept. Clerk.*

Indorsed as follows: Filed August 3d, 1864.
GEO. W. PRESCOTT, *Clerk.*

STATE OF MINNESOTA,
District Court, Second Judicial District, County of Ramsey:

CASPER H. SCHURMEIER
against
THE ST. PAUL AND PACIFIC RAILROAD COMPANY, William B. Litchfield, and Rudolph H. Fitz.

Having heard the proofs and allegations of the parties in the above-entitled action, and having duly considered the same, I, the subscriber, sole referee in said action, do find and report the following facts:

1. That the premises in question in this action are included in that part of section five, (5,) in township twenty-eight (28) north, of range twenty-two (22) west of the fourth principal meridian, which is situate on the left or north side of the centre line of the Mississippi river.

2. That the said part of said section five (5) was surveyed
29 by the deputy surveyor for the United States on the 27th day of October, 1847, and that the field notes of such survey were duly communicated by the deputy surveyor who made the survey to the proper surveyor general, who afterwards, and on the 15th day of March, 1848, duly approved the same. A copy of said field notes is hereto annexed, marked A, and made a part of this report.

3. That a map or plat of said part of said section was duly prepared and certified by the proper surveyor general on the 15th day of March, 1848, and the same was duly transmitted to the local land office in the land district in which the said lands were then situated. A copy of said map or plat is hereto annexed, marked B, and made a part of this report.

4. The said part of said section five (5) consists of two separate parcels, one of which is situate in the northeast corner, and the other in the northwest corner of the said section. That part parcel which is situate in the northwest corner is designated on said map or plat as lot numbered one, (1,) and the parcel situate in the northeast corner is thereon designated as lot numbered two, (2.) Lot one (1 contains, according to the said map or plat, nine acres and twenty-eight one-hundredths of an acre of land, and lot two (2) contains, according to said plat, one acre and thirty-three one-
30 hundredths of an acre of land.

6. That afterwards, and prior to the 24th day of March, 1849, Louis Roberts purchased both of said lots of the United States, and paid to the proper land office of the United States the purchase money therefor in full; and that, on the said 24th day of March, 1849, a patent, in due form of law, was duly signed, sealed, and issued by the proper officers of the United States, whereby the United States did give and grant the said Louis Roberts and to his heirs "Lots numbered one (1) and two of section five, in township twenty-eight north, of range twenty-two west, in the district of lands subject to sale at the Falls of St. Croix, Wisconsin, containing ten acres and sixty one-hundredths of an acre, according to the official plat of the survey of said lands returned to the general land office by the surveyor general. A copy of said patent is hereto annexed, marked C, and made part of this report.

6. That in the spring of 1849 the said lot one (1) in said section five 5) was surveyed, laid out, and platted into town blocks, lots, streets, &c., constituting a part of the town of Saint Paul; the said survey and plat of said town included all the land embraced in lot one, (1,) and extended to the main channel of the Mississippi
31 river, without regard to the meander line of said lot. The premises described in the plaintiff's complaint, to wit. lots eleven (11), and twelve, (12,) in block twenty-nine, (29, are in, so

designated by, and upon said plat of the town of and are situated in the triangnlar fraction of land in the northwest corner of said section 5.

The larger part (about two-thirds) of said lots eleven and twelve, in block twenty-nine, is situate south of the meander line of said lot one in said section five. The residue of said lots 11 and 12, in block 29, is on the north side of said meander line. The plat hereto annexed, marked D, and made part of this report, exhibits the north and west lines of said lot one in said section five. Also, the meander line of the same by the courses and distances thereof, as specified in the said field notes; and also that part of lots 11 and 12, in block 29, which lies on the north side, and that part thereof which lies south side of the said meander line. All that parcel of land lying between the front or southerly line of said block 29 and the main channel of the Mississippi river, as well as the like space between the blocks west of said block 29 and the river, is on said town plat designated as "landing."

The said town plat was certified by the proprietors of the
32 lands included in it (and among them is the said Louis Roberts) on the 16th day of May, 1849, and the same was duly recorded in the office of the proper register of deeds.

7. That after the making and recording of the said plat of the town of Saint Paul, and prior to the erection of the plaintiff's warehouse hereinafter designated, the title in fee to said lots eleven (11) and twelve, (12,) in said block twenty-nine, (29,) as designated on the said town plat, was duly transferred and passed from the said Louis Roberts, through intermediate conveyances, to the said plaintiff, who was at the time of the commencement of the railroad works hereinafter described, and of the commencement of this action, the owner of the said lots, and seized of the title thereto in fee, with the appurtenances, to the extent to which the said Louis Roberts received the title thereto from the United States, and to the extent of his right and power to convey the same, and no further.

8. That ever since Saint Paul has been organized under the city charter thereof, passed March 4th, 1854, the municipal government of said city, created and established by the said charter, has exercised municipal power and control over the space or parcel of
33 land designated on said plat as "landing," and lying between the main channel of the Mississippi river and the said block twenty-nine, (29,) and other blocks west of it; and that in the exercise of such authority over the said "landing" the said city government established a grade therefor; and, prior to March, 1856, caused considerable work to be done towards reducing the surface of said "landing" or levee to the grade so established.

9. That at the time when the government survey of said lot one (1) in said section five (5) was made as hereinbefore mentioned, the said meander line of said lot was run along the left or northerly bank of a small channel or slough between said bank and the parcel of land which is hereinafter designated as "Island No. 11;" that in very low water in the river there was no current, and very little

water, and that in pools in said channel or slough; that at a medium stage of water in the river the land designated as "Island No. 11" was above water, and there was a current or flow of water through the said channel or slough, and that in very high water in the river the said land designated as "Island No. 11" was inundated.

34 The map or plat hereto annexed marked "E" and made part of this report, exhibits the said channel or slough, and also said Island No. 11.

No mention of said channel or slough or of the said island is made in the field notes of the said government survey of October 27th, 1847, nor is the said island in any manner designated or shown on the map or plat prepared from said field notes, of said survey of said lots one (1) and two (2) of said section five, (5,) and which was the only official map or plat thereof in the local land office at the time when the same the same were purchased by the said Louis Roberts, and when the said patent therefor was issued to him as hereinbefore stated.

10. That on the 13th day of March, 1856, the parcel of land lying between the said channel or slough and the main channel of the Mississippi river, was surveyed by J. M. Marshall, a deputy surveyor, under instructions from the Commissioner of the General Land Office, of the date of February 21st, 1854. The field notes of said survey, a copy of which is hereto annexed and made part of this report, were duly communicated by the said deputy surveyor to the proper surveyor general, who afterwards, and on the 24th day of Septem-

35 ber, 1856, duly approved the same.

11. From the said field notes a map or plat of the said last-mentioned parcel of land was prepared and certified by the surveyor general on the 24th day of September, 1856, and made of record in his office. The said map or plat, or duplicates thereof, were communicated to the General Land Office, and to the proper local land office. A copy of said plat or map is hereto annexed, marked E, and is hereinbefore refered to. It exhibits the said parcel of land which is thereon and the surveyor general's certificate thereto, designated as "Island No. 11," in its true relation to said lot 1 in said section 5, and to the said channel or slough, and to the main channel of the Mississippi river.

12. That prior to the said survey of said "Island No. 11" in March, 1856, the city of Saint Paul had, in grading the levee or landing between said block 29 and the river, entirely filled the said channel or slough at the upper or west end thereof, and extended the grade entirely across said "Island No. 11" to the main channel of the river.

The surface of the land included in said "Island No. 11," in its natural condition, was about four feet lower than the main

36 land on the opposite side of said channel or slough, in said lot 1 of said section 5; and the landing place for boats plying upon the Mississippi river was always on the south or river side of said "Island No. 11," and along the river bank or levee above or west of it; a large majority of the business between the boats and the

levee and warehouses having been done at that part of the "landing" above or west of "Island No. 11."

13. The front or southerly line of lots 9, 10, 11, and 12, of said block 29, is on "Island No. 11," and the plaintiff's warehouse is situate on the west side of said lot 11. The front or south wall of the plaintiff's warehouse is about four feet back or north from the front or southerly line of said lot 11.

Before the plaintiff commenced the erection of said warehouse, and preparatory thereto, he procured the city engineer of St. Paul to show him the grade of the levee in front of said lot 11, as established by the city authorities, and he fixed the elevation or level of the lower floor of said warehouse with reference to such grade. The warehouse was built in 1860.

14. At the east wall of the said warehouse, the distance between the meander line of said lot 1, in said section 5, and the meander line on the north side of "Island No. 11," is about 28 feet, which
37 was the width of said channel or slough at that point, as determined by the said meander lines. The said meander line of said lot 1 in said section 5, intersects the east wall of the plaintiff's said warehouse about sixty seven (67) back or northerly from the the southeast corner of the same, and the northerly meander line of Island No. 11 intersects the same wall about thirty-nine (39) feet back or northerly from the same corner of said warehouse.

It is about 118 feet from the said meander line of said lot 1 in said section 5, to the south meander line of Island No. 11, on the east line of said warehouse produced across Island No. 11, which is at that point about ninety feet wide. From the western extremity of Island No. 11 to the west wall of the plaintiff's said warehouse is about 164 feet, following the northerly meander line of said Island No. 11, and the said western extremity of said Island No. 11 is about 18 feet east of the west line of said block 29, produced southerly. The map or diagram hereto annexed, marked G, and made a part of this report, exhibits the position of Island No. 11, and its northern meander line, in their true relation to the meander line of said lot 1 in said section 5, to said block 29 and said lots 11 and 12 in said block, and to the plaintiff's said warehouse.

15. That ever since the survey and plat of the town of St.
38 Paul was made, the space between the main channel of the Mississippi river and the town blocks fronting thereon, and designated on said plat as "landing," has been used as a public landing or levee for steamboats and vessels touching at St. Paul, or plying between that place and other places upon the Mississippi river, and upon other navigable rivers tributary to or connected with it, and that said landing as designated on said town plat include the space between said lots 11 and 12, in said block 29, and the main channel of the river, and has been used for such purposes ever since it was, as hereinbefore stated, so graded by the city of St. Paul as to be susceptible of or proper for such use.

16. After that part of said landing or levee lying between the plaintiff's said warehouse and the main channel of the Mississippi river

had been so graded by the city of St. Paul, and while it was being used for the purpose of a public levee or landing in connection with the navigation of the said river, the defendant, "the St. Paul and Pacific Railroad Company," entered upon the same for the purpose of there constructing railroad tracks permanently, and for continual use without any definite limit as to time. The said defendant commenced the construction of the railroad track there in the fall
39 of 1862, and was engaged in said work when this action was commenced, the said defendants, Wm. B. Litchfield and Rudolph H. Fitz, being in the service of said company in directing and doing said work. Since the commencement of this action the said company has completed the said railroad tracks along said landing or levee in front of said block 29 to a point nearly opposite the southwest corner of said block; the same being located on said levee directly between the said plaintiff's lots and warehouse and the main channel of the Mississippi river.

17. In constructing the said railroad tracks, the defendant has so raised the grade upon the said levee that the top of the rails thereof is 21½ inches higher than the lower floor of the plaintiff's said warehouse, and the north rail of said track 50.3 feet from the front wall of said warehouse. There are two tracks there on a level with each other or nearly so, and the grade from the south side of the south tracks to the water is rendered much steeper than the former grade of the levee between the plaintiff's warehouse and the water. The diagram of a cross section of the said levee in front of the plaintiff's warehouse, on plat G, hereto annexed, exhibits the change of grade made upon the levee at that point by the construction of
40 the said railroad tracks, and the relation of those tracks to the plaintiff's said warehouse, and to the waters of the river at different stages.

18. That the said railroad works of the defendant, and the use thereof, are an obstruction to the plaintiff in the use of his said warehouse in connection with the navigation of the Mississippi river, and will continue to be such an obstruction so long as the said works shall there remain—that whatever may be the benefits derived by the plaintiff from the construction of the said railroad in its common effect upon the value of property near it, the said obstruction to the free use of the said property of the plaintiff is an injury personal to himself and distinct from the injury (if any) to the public, occasioned by the construction and use of the said railroad tracks on the said levee.

19. The whole of the said railroad works of the defendant, and of which the plaintiff has complained in the action, are located upon "Island No. 11," as defined by the meander lines thereof, and exhibited on plat D and plat G, hereto annexed, and south of it, and said "Island No. 11" is in said section 5.

20. The defendants claim to justify their said entry and works on said levee and "Island No. 11," under and by virtue of the following mentioned statutes.

1. The act of Congress granting lands in alternate sections
41 (sections of the odd numbers) to the Territory of Minnesota to

aid in the construction of certain railroads therein, &c., passed March 3d, 1857.

2. Chapter 1 of the act of the legislative assembly of the Territory of Minnesota, to execute the trusts created by the said act of Congress and to grant certain lands to railroad companies therein named, passed May 22, 1857.

3. Amendment of section ten of article nine of the constitution of the State of Minnesota, adopted April 15th, 1858.

4. An act concerning land grant railroads, passed Aug. 12th, 1858, and an act in addition thereto, passed the same day.

5. An act to facilitate the construction of the Minnesota and Pacific railroad, and to amend and continue the act of incorporation relating thereto, passed March 10th, 1862.

6. An act of Congress to grant the right of way to all rail and plank roads through the public lands of the United States, passed Aug. 4th, 1852.

7. An act to extend the provisions of last above-mentioned act to the public lands in the Territories of the U. S., passed March 3, 1855.

Upon the facts as aforesaid found, I find and report the conclusions of law following:

1. That the meander line of said lot one (1) of said section
42 five (5) is not a boundary of said lot. The water course is the boundary, and the meander line was in this, as in all other like cases of fractions of public land bordering upon navigable rivers, run for the purpose of defining the courses and distances of the sinuosities of the bank of the stream, and determining the quantity of land in the fraction to be paid for by the purchaser upon a sale of the fraction by the government. In preparing the official maps or plats of such fractions from the official and approved field notes of the surveys thereof, the meander line is made the border line of the water course, and is so represented on the maps or plats.

Those official field notes and maps or plats constitute the public records and muniments of the original title to the lands defined by them as they were designated by numbers on the plats.

All parties, as well the government as others, are bound and controlled by them after the title has passed from the government.

The line so defined on the said maps or plats as the border line of the water course must be taken and considered in the law as the line of the water course—the line of contact of the water with the bank of the stream, whether it be in fact so or not; and all land lying between the meander line and the middle thread of the stream must for all purposes of adjudicating the rights of parties therein, be regarded as land covered with the waters of the stream, the
43 same as if it was in fact so covered. Such meander line is tantamount to a call for the water course as a boundary.

2. That Louis Roberts, by his said purchase and patent from the United States, took and became seized of the title in fee to all the land included in said lot one (1) in said section (5,) which is bounded on the north by the north line of said section, on the west by the west line of said section, and on the third and only other side there-

of, by the Mississippi river, and that notwithstanding the quantity of land contained in said fractional lot one is defined on the official plat thereof to be only 928 acres, he, by his said purchase and patent, took such title to all the land between the northern boundary thereof and the middle thread of the said river, subject to the public easement or servitude of the free navigation of said river—the eastern line of said land running from the eastern meander post or corner of said lot one, due south to the centre line of the said river.

3. That all that part of said lot one in said section five, which is embraced in the "landing" as designated and defined by and on the plat of the town of Saint Paul, was, by said plat, dedicated to the public use for the purposes of a public levee or highway, and particularly for all the purposes of carrying on any and all commerce and trade requiring a free communication between the navigation
44 of the said river and the public thoroughfares of the country; that such dedication has been accepted, and the said "landing" appropriated accordingly, by the proper authorities representing and acting for the public, and that said dedication was and is valid and effectual for all the purposes for which it was intended.

4. That the conveyance of lots 11 and 12 in said block 29 by that description, as established by the said town plat, from the said Louis Roberts through mesne conveyances to the plaintiff, transferred to and vested in the said plaintiff the title in fee to all that part of the said levee or "landing" lying directly between the said lots 11 and 12 and the river, subject, however, to the public easement to which the same had been previously dedicated and appropriated as hereinbefore stated. [At the time when the said survey and plat of the town of Saint Paul were made, and when the said town plat was recorded, the laws of the Territory of Wisconsin were in force in Minnesota, and the said town plat was made and recorded under and by virtue of the statutes of Wisconsin in such case made. It was by that statute provided that "when the plat or map shall have been made out and certified, acknowledged and recorded as required by this chapter, every donation or grant to the public * * * marked or noted as such on said plat or map shall be deemed in law and equity a sufficient conveyance to vest the fee simple of all such parcel or
45 parcels of land as are therein expressed, and shall be considered to all intents and purposes a general warranty against such donor or donors, their heirs and representatives, to the said donee or donees, grantee or grantees, for his, her, or their use, for the uses and purposes therein named, expressed, or intended, and no other use or purpose whatever; and the land intended to be for streets, alleys, ways, commons or other public uses in any town or city, or addition thereto, shall be held in the corporate name in trust to and for the uses and purposes set forth and expressed or intended."

The defendants insist that the dedication or donation of the land embraced in the "landing," as defined by and upon the said town plat, to the public for the uses and purposes of a public street or levee, vested the title or fee thereto in the corporation of the town of St. Paul, and subsequently in the city corporation of the city of St.

Paul as the successor of the said town corporation, in trust for the uses and purposes intended by the said dedication or donation, and that whatever the effect of the conveyance of the said lots 11 and 12 in said block 29 to the plaintiff, by that description, might otherwise be, such conveyance could not divest the corporation of the title in fee to said part of said "landing," so vested in and held by the same, and vested it in the said plaintiff, and that consequently the title of the plaintiff is necessarily limited to the lines of the said lots,
46 though the main channel of the river should be determined to be the boundary of said lot 1 in said section 5, as granted by the United States to the said Louis Roberts.

Upon this question, I hold, 1st, that the rights of the public in lands dedicated to, or donated for public uses, as streets, ways, &c., under the said statute of Wisconsin, are not other or greater than, or different from, what they would be under the like dedication or donation in the absence of such statute.

2d. That though it should be determined that the legislature had the power necessary to declare such dedication or donation of land to such public uses or purposes to be a transfer of the title in fee to the public, or to a municipal corporation, such title would, by the terms of the statute, be vested in trust for such uses and purposes only, and subject to reversion whenever such uses and purposes should cease.

3. That in case of such reversion of the title to said "landing," the plaintiff, or his heirs or assigns, as the grantees of Robert's title to said lots 11 and 12, by that description, would take the fee to all that part of said "landing" lying between them and the main channel of the river, so that really, for all practical or valuable purposes, the plaintiff's rights in said "landing" are the same, whether the fee thereof be vested in the city corporation in trust, as aforesaid, or in himself; and

4th. That whether such title in fee be vested in the city
47 corporation, in trust as aforesaid, are in the plaintiff, his right to free and unobstructed passage over said "landing," between his warehouse and the river is the same, and his right of action for any obstruction to the said passage would be the same.]

5. That the United States having granted to Louis Roberts the whole of said lot 1, in said section 5, which included all the land between the north line of said lot and the middle thread of the Mississippi river, the subsequent survey of "Island No. 11," which is within the limits of the said grant to Roberts, was unauthorized by law, and the same and the field notes, and map or plat thereof, were and are void; and that the said defendant, "the St. Paul and Pacific Railroad Company," did not nor could acquire, under or by virtue of either or any of the laws hereinbefore mentioned, any lawful right to enter thereon for the purpose of constructing and establishing there any railroad track or tracks, or other permanant works for the use of said company, or any lawful right to there construct, establish, or use any such railroad track or works.

6. That although the construction, continuance, and use of said

railway tracks on the said "landing," is an obstruction to the use thereof by the public for the use and purposes to which the same is dedicated; and although the proper public authorities may have a right of action to remove the same therefrom, the fact that
48 the said railroad tracks and the use thereof are an obstruction to the free passage over said "landing" between the plaintiff's warehouse and the river for the purposes of commercial business carried on in said warehouse, is such an injury to the plaintiff, in particular, and distinct from the public injury occasioned thereby, as entitles him to maintain an action to prevent the same or recover compensation therefor.

7. That although the said injury to the plaintiff is permanent and continuing, I am unable to avoid serious and embarrassing doubts whether it is of that magnitude and extent which are necessary to justify a perpetual injunction to restrain and enjoin the defendants against the construction and use of a railroad track or railroad tracks at the locus in quo; and whether the said injury is not susceptible of full pecuniary compensation to the plaintiff, and at the same time leave him the owner and occupant of the said lots 11 and 12, and the said warehouse; but considering the views and conclusions which I have hereinbefore expressed upon the question of title, and to avoid cross appeals in the case, I have deemed it advisable and best to grant to the plaintiff the relief demanded by him in his complaint, and therefore I have so determined as a conclusion of law in the case.

It is therefore ordered that the plaintiff have judgment or decree for the relief demanded by him in and by his complaint in this action, and that he be allowed to prepare such judgment or de-
49 cree, and cause the same to be signed and entered in due form accordingly.

Dated June 4th, 1864.

ANDW. G. CHATFIELD,
Sole Referee.

50 A.

Copy of the field notes of the survey of that part of section 5, township No. 28 north, range No. 22 west, 4th principal meridian, (situated on the north or left bank of the Mississippi river,) included in the original survey. Approved March 15th, 1848.

North boundary (township line) (west:) From corner of section 4 and 33, from which a B. oak 14 in. diam. bears N. 31 W., 34 l'ks dist.; B. oak 12 in. diam. bears N. 33 E., 60 l'ks dist.; B. oak 11 in. diam. bears S. 55 W., 26 lk's dist.; B. oak 6 in. diam. bears S. 65 E., 14 l'ks dist.; thence between sections 5 and 32, var. 11°, (7.60.) To bend of Mississippi river, and set meander post, from which a B. oak 6 in. diam. bears S. 75 E., 52 lks. dist.; a B. oak 6 in. diam. bears N. 6 E., 26 l'ks dist. (63.10.) Leave river on same side, and set meander posts, from which a W. maple 48 in. diam. bears west 16 l'ks dist.; W. maple 36 in. diam. bears N. 30 E., 6 l'ks dist.; (80.00.) Set post corner of sections 5, 6, 31, and 32, from which a Br.

oak 5 in. diam. bears S., 70 E., 30; B. oak 7 in. diam. bears S. 54 W., 68; B. oak 8 in. diam. bears N., 34 W., 133.

Subdivisons.

Commencing on north boundary between sections (south) 4 and 5; thence var. 10° 40′ E.; (3.50.) Intersect left bank of Mississippi river, and set post for meander corner, from which a burr oak 18 in. diam. bears S. 85 E., 74; burr oak 12 in. diam., bears N. 21
51 W., 115; commencing on north boundary between sections (south) 5 and 6; thence, var. 10° 45′ E.; (2.00.) Enter bottom course SW.; (12.83.) Intersect left bank of Mississippi river, and set post for meander corner, from which an elm 20 in. diam. bears N. 30½ E., 169 l'ks dist.; elm 22 in. diam. bears N. 82½ W., 161 l'ks dist.

Meanders of Mississippi river, commencing at meander post on line between sections 4 and 5; thence in sec. 5 up stream N. 65½ W., 840, to line of north boundary, 7.60 lks. west of corner to sections 4 and 5.

Beginning on north boundary 63.10 l'ks west of corner of sections 4 and 5, thence up stream: S. 61 W. 6.50; S. 54 W., 6.00; S. 46 W., 5.00; S. 40 W. 3.96 to line of sections 5 and 6 at lower end of the town of St. Paul.

Survey made October 27th, 1847.

Survey approved by surveyor general, March 15th, 1848.

C.

52 THE UNITED STATES OF AMERICA:

Certificate No. 50.

To all whom these presents shall come, greeting: Whereas Louis Roberts, of St. Croix county, Wisconsin, has deposited in the General Land Office of the United States a certificate of the register of the land office at the Falls of St. Croix, whereby it appears that full payment has been made by the said Louis Roberts, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," for lots numbered one (1) and two (2) of section five in township 28 north, of range twenty-two west, in the district of lands subject to sale at the Falls of St. Croix, Wisconsin, containing ten acres and sixty one-hundredths of an acre, according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Louis Roberts: Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents to give and grant, unto the said Louis Roberts, and to his heirs, the said tract above described: To have and to hold the same together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto be-

53 longing, unto the said Louis Roberts, and to his heirs and assigns forever.

In testimony whereof, I, Zachary Taylor, President of the United States of America, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-fourth day of March, in the year of our Lord one thousand eight hundred and forty-nine, and of the independence of the United States the seventy-third.

By the President,

[L. S.] Z. TAYLOR,
By THOS. EWING, JR., *Sec'y.*

Recorded vol. 1 page 1.

E. S. H. LAUGHLIN.
Recorder of the General Land Office.

Filed for record on the 18th December, A. D. 1849, at 2 o'clock p. m.

Recorded in book A of deeds on page 61.

OFFICE OF REGISTER OF DEEDS, *Ramsey County, Minn.:*

I hereby certify that I have carefully compared the annexed copy of patent with the original on record in my office, and that the same is a true and complete transcript thereof.

Witness my hand and official seal this 3d day of February, A. D. 1864.

[SEAL.] CHAS. PASSAVANT,
Register of Deeds.

[U. S. rev. stamp, 5 cents.]

54 Township line between townships 28 and 29 N., R. 22 W.

West.

Between sections 5 and 32. Variation 11°.

63.10

Leave bend of river and set meander post from which
A white maple 48 in. diam. bears west 16 lks. dist.
A white maple 36 in. diam. bears N. 30 E., 6 lks. dist.

80.00

Set post at corner to sec's 5, 6, 31, and 32 from which
A burr oak 5 in. diam. bears S. 70 E., 30 lks. dist.
A black oak 7 in. diam. bears S. 54 W., 68 lks. dist.
A black oak 8 in. diam. bears N. 34 W., 133 lks dist.

South.

Township 28 N., R. 22 W., 4th prin. mer. Between sections 5 and 6. Variation 10° 45'.

2.00

Enter bottom course S. W.

12.83

Intersect left bank of Mississippi river and set post for meander corner from which

An elm 20 in. diam. bears N. 30½ E., 160 lks. dist.
An elm 22 in. diam. bears N. 82½ W., 161 lks. dist.
Land level, 2nd rate soil; timber, maple, ash, elm, &c.

Meander of left bank of Mississippi river:

Beginning on north boundary 63.10 chs. west of corner, thence up stream.

S. 61 W. 6 chs. 50 lks.
S. 54 W. 6 chs. 00 lks.
S. 46 W. 5 chs. 00 lks.
S. 40 W. 3 chs. 96 lks.

To the line of sections 5 and 6 at lower end of the town of St. Paul. Survey, made October 27th, 1847.

Survey approved by surveyor general, March 15th, 1848.

Survey of an island in the Mississippi river, in section 5
55 township 28 N., R. 22 W., 4th prin. mer.

Beginning at the meander post on left bank of Mississippi river on line between sec's 5 and 6 from which the flag on the head of island bears it 70° 15′ E. distant 1.67 chs., and set post for witness in mound of earth; thence

N. 65° 15′ E. 8 chs. 07 lks. Variation 11° 15′.
N. 56 45 E. 5 chs. 26 lks.
N. 45 30 W. 2 chs. 61 lks.
S. 56 15 W. 5 chs. 87 lks.
S. 52 00 W. 4 chs. 68 lks.
S. 36 15 W. 2 chs. 34 lks. To point of beginning.

Banks low; alluvial soil, 3d rate; timber, none.

This island is at and embraces part of the lower levee of St. Paul, and at the upper end of the island it has been grated from the main bank (which is about 4 feet higher than the island) cut across the island to the river; all the timber has been cut off for several years, and therefore I could not take bearings to the witness point.

Surveyed March 13th, 1856.

Survey approved by surveyor general, Sept. 24th, 1856.

I hereby certify that the foregoing is a true and correct copy of the field notes of the surveys therein described on file in this office.

Surveyor general's office, Saint Paul, Feb. 5th, 1863.

W. D. WASHBURNE,
Surveyor General of U. S. for Minnesota.

Indorsed as follows:
"Filed July 23d, 1864.

"GEO. W. PRESCOTT, *Clerk.*

(Here follows maps Nos. 1, 2, 3, and 4, page 55.)

56 STATE OF MINNESOTA,
County of Ramsey District Court, 2d Judicial District, ss:

CASPER H. SCHURMEIER, plaintiff,
against
THE ST. AND PACIFIC RAILROAD COMPANY, William B. Litchfield, and Rudolph H. Fitz, defendants.

Pursuant to the report of the referee in this cause, duly filed herein on the 23d day of July, A. D. 1864.

On motion of Lorenzo Allis, esq., plaintiff's attorney, it is hereby ordered, adjudged, and decreed, that the said defendants, the St. Paul and Pacific Railroad Company, William B. Litchfield, and Rudolph H. Fitz, and each of them, their officers, agents, attorneys, employees, and servants, and each and every of them, be forever restrained and enjoined from erecting or constructing and trestle-work, track or other work on the street, levee, or landing or any part thereof, in front of lots numbered eleven (11) and twelve (12) in block number twenty-nine (29) in the original town of St. Paul, according to the plat thereof on record in the office of register of deeds for the county of Ramsey and State of Minnesota; and from entering upon, using, or occupying the said street, levee, or landing, or
57 any part thereof, for the purposes of a railroad, or for the purpose of erecting, constructing, or building thereupon any track, trestle-work, railway, or other work; and from running or using any cars or engines thereupon, and from anywise obstructing or impeding the free use of the said street, levee, or landing by the public.

And it is further ordered, adjudged, and decreed, that said defendants do forthwith remove from said street, levee, or landing, immediately in front of the plaintiff's said premises, any and all tracks, trestle-works, embankments, buildings, and obstructions of every kind whatsoever, erected or constructed thereon by said defendants for railroad purposes as aforesaid, at and before the commencement of this action or at any time thereafter.

It is further ordered, adjudged, and decreed, that the plaintiff herein recover of said defendants the sum of one hundred and thirteen dollars and fifty-five cents, costs and disbursements herein, as taxed.

Signed this 3d day of August, A. D. 1864.

GEO. W. PRESCOTT, *Clerk.*

Indorsed as follows:

"Filed August 3d, 1864.

"GEO. W. PRESCOTT, *Clerk.*"

58 STATE OF MINNESOTA,
District Court, Second Judicial District, Ramsey County:

CASPER H. SCHURMEIER
against
THE SAINT PAUL AND PACIFIC RAILROAD Company, and William B. Litchfield and Rudolph H. Fitz.

To Loronzo Allis, esquire, attorney for the above-named plaintiff, and George W. Prescott, esquire, clerk of the above-named court:

GENTLEMEN: You will please to take notice that the above-named defendants appeal to the supreme court of the said State of Minnesota, from the judgment, order, and decree rendered and made in this action, and entered, and docketed on the third day of August, one thousand eight hundred and sixty-four.

Dated Aug. 3, 1864.

Yours, &c.,

MASTERSON & SIMONS,
Atty's for Def'ts, residing at St. Paul, Minnesota.

Indorsed as follows: Due service of a copy of the within admitted this 6th day of August, 1864.

LORENZO ALLIS, *Plff's Atty.*
GEO. W. PRESCOTT, *Clerk.*

Filed August 6th, 1864.

GEO. W. PRESCOTT, *Clerk.*

59 STATE OF MINNESOTA, *County of Ramsey, ss:*

I, Geo. W. Prescott, clerk of the district court for the 2d judicial district and county of Ramsey aforesaid, do hereby certify and return to the honorable the supreme court of said State, that the foregoing is a full and true copy of the judgment, roll, and notice of appeal filed in the above and within entitled action, as appears from the originals remaining on file and of record in my office.

Witness my hand and official seal, at St. Paul, this 13th day of October, A. D. 1864.

[L. S.)

GEO. W. PRESCOTT, *Clerk.*
By SHERWOOD HOUGH, *Deputy Clerk.*

[U. S. rev. stamp, 5 cents.]

60 State of Minnesota, supreme court.

CASPER H. SCHURMEIER, respondent,
vs.
THE SAINT PAUL AND PACIFIC RAILROAD Company, William B. Litchfield, and Rudolph H. Fitz, appellants. } January term, 1865.

Pursuant to an order of this court made in this action and entered in the order book of the court on this 25th day of January, A. D.

1866, it is here and hereby determined and adjudged, that the judgment heretofore rendered and entered in this action in the court below, to wit, in the district court of the second judicial district, sitting within and for the county of Ramsey, be, and the same hereby is, in all things affirmed.

And it is hereby further determined and adjudged that the respondent above named do have and recover of the appellants herein the sum and amount of twenty-two dollars and twenty cents, ($22 20,) for his costs and disbursements in this action in this court, and that he do have execution for the enforcement hereof.

Dated and signed January 25th, 1866.

BY THE COURT.

61 Attest: GEO. F. POTTER, *Cl'k Sup. Court.*

STATE OF MINNESOTA, *Supreme Court, ss:*

I, George F. Potter, clerk of the said supreme court, do hereby certify that the foregoing manuscript writing, appearing on the preceding page of this sheet of legal cap writing paper, is a true and correct copy and transcript of the entry of judgment in the cause therein entitled, as the same appears entered and of record in the judgment book of this court.

In witness whereof I have hereunto set my hand and affixed the seal of our said supreme court, at the city of St. Paul, in the said State of Minnesota, this 25th day of January, A. D. 1866.

[L. S.] GEO. F. POTTER,
Cl'k Sup. Court.

62 STATE OF MINNESOTA, *Supreme Court, ss:*

I, George F. Potter, clerk of the said supreme court, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing manuscript writing is a true and correct copy and transcript of the judgment roll in the case of Casper H. Schurmeier, respondent, *vs.* the Saint Paul and Pacific Railroad Company, and William B. Litchfield, and Rudolph H. Fitz, appellants, the said judgment roll being the record and proceedings in said action, with all things concerning the same, as also the writ of error in said case served upon the judges of this court, and the citation in said action served upon the said Casper H. Schurmeier with acceptance of service thereupon admitted.

In witness whereof I have hereunto set my hand and affixed the seal of the said supreme court at the city of St. Paul, in the said State of Minnesota, this 24th May, A. D. 1866.

[L. S.] GEO. F. POTTER, *Clerk.*
By A. McELRATH, *Dep. Clerk.*

No 37

In the Supreme Court of the United States.

THE ST. PAUL & PACIFIC RAILROAD COMPANY, WM. B. LITCHFIELD, AND RUDOLPH H. FITCH,

vs.

CASPAR H. SCHURMEIER.

In error, from the Supreme Court of the State of Minnesota.

Statement.

In December, 1862, the defendant in error filed his complaint in the District Court of Ramsey County, in the State of Minnesota, showing—

That he is, and for a long time has been, the owner and seized in fee of lots 11 and 12, in block 29, in the original town of St. Paul, of the value of $20,000, upon which is a store ware-house of great value, from which property he had realized large rents; that said premises front upon a street and levee running along the Mississippi River in front of St. Paul; that such street and levee are the usual landing for steamboats at that port; that said river is a navigable and deep stream, upon which there is large commerce, between said city of St. Paul and other points on said river and its tributaries; that said river is deep and navigable immediately up to the said street and levee; that said street and levee were duly set apart and dedicated and improved as and for a street, levee and public landing, and have been used for the same; and that said street and levee are indispensible to the public, and the owners of property fronting thereon; and that the whole space between his premises and

the bank of the river, are used for said street, levee, and landing; that he is the owner of said space down to the river, subject only to the easement of the public therein; that the principal value of his property is in its frontage on said street, levee, and landing, and in the free use thereof as a street, &c., and that without the free use of said street, &c., his said property would be nearly or quite valueless; that the plaintiff in error is a body corporate under the laws of Minnesota; that plaintiff in error, the said railroad company, has constructed a railway from the city of St. Paul to the city of St. Anthony, in said State, and is now running cars thereon for the transportation of passengers and freight, and is now constructing the same upon and along said street, levee, and landing, and especially in front of his premises, with the design of running cars thereon, and of using and occupying the said levee, street, and landing for all time to come, and has nearly completed the trestle work for the said railroad immediately in front of its said property, and that said trestle work is about six feet above the grade of said street, levee, and landing, that the same does and will permanently obstruct and prevent the further use and occupation of said street, levee, and landing for the purposes of such street, levee, and landing, and will render his property untenable, useless, and valueless or nearly so, and will thus erreparably injure and damage defendant in error; that the plaintiff in error has no authority from defendant in error, from the city of St. Paul, the State of Minnesota, or from any person or party, any license, grant, right, or authority to enter upon, use and hold said street, levee, and landing, or any part thereof for any purpose whatever, nor to construct said trestle work and railroad thereon; that the plaintiff in error is a tresspasser thereon and a public nuisance; that the other defendants (below) are the agents and employees of said railroad company in said work. Prayer for injunction restraining the plaintiffs in error from prosecuting

said work or continuing the same on said street, levee, and landing.

The plaintiffs in error answered, *under oath*, that the defendant in error is not, and never has been the owner of that part of lots No. 11 and 12, which is south of the southeast or meander boundary line of lot No. 1, in section 5, in township 28, north of range 22, west; and that he is not, and never has been the owner of the street levee or landing, lying between said lots, 11, 12, and the main channel of the Mississippi river; nor does he have any right or interest in the lands upon which the said railroad has been located The answer denies the dedication of the street, levee, and landing, as set forth in the complaint. The answer further states that the land between said meander line and the main channel of the river is a part of the lands granted by the United States to the State of Minnesota, by the act of March 3, 1857, and that the State of Minnesota and the Territory of Minnesota have transferred the same to the Plaintiff in error, under and by virtue of which the said railroad has been located and constructed.

The defendant in error replied by general denial of the new matter in the answer.

The Court referred the case to Andrew G. Chatfield, as referee, to hear and determine all the issnes and report a judgment to the Court. Page 10 of Record.

The referee reported his finding, from p. 10 to p. 19:

1st. That the premises in question are in that part of sec. 5, T. 28, N. R. 22, which is on the left or north side of the center of the river.

2d. That the said part of the section was surveyed on the 27th October, 1847, and the survey was duly approved. A copy of the field notes is made a part of the report. Pages 19, 20, 21, and 22.

3d. A plat of the survey is made a part of the report, marked B.

4th. The fraction in the northwest corner of the section 5, is known on the plat as lot one, and contains 9.28 acres.

5th. That Lewis Roberts bought said lot 1 and also 2 from the United States, March 24, 1849, and that a patent issued to him for it, describing them as lots No. 1 and 2, section 5, T. 28, N. R. 22, W., in the district of lands subject to sale, &c., containing 10.61 acres, according to the official plat of the survey.

A copy of the patent, marked C, is made a part of the report. Page 20.

6th. That in the spring of 1849, said lot 1, section 5, was laid out and platted as a part of St. Paul, including also the premises outside the meander line to the main channel of the river, and that lots 11 and 12 are a part of such survey and plat, and that about two-thirds of said lots 11 and 12 lie south of said meander line of lot 1, section 5; the residue of said lots is north of said meander line. Plat marked D accompanies the report and exhibits the north and west and meander line of said lot one, and that part between block twenty-nine and the main channel of the river is designated on the plat as landing. The plat was certified by the proprietors, including Lewis Roberts, on the 16th of May, 1849, and the same was duly recorded.

7th. That after the making of said plat, said lots 11 and 12 came to defendant in error by a series of conveyances in fee to the extent that Lewis Roberts received title thereto from the United States, and to the extent of his right to convey the same.

8th. That ever since St. Paul become a chartered city in March, 1854, she has exercised municipal control over the premises between block 29 and the river, marked on the plat as landing, established a grade for the same, and prior to 1856, did considerable work towards the grading.

9th. That when the survey of 1847 was made of lot 1, section 5, the meander line of said lot was run along the left

or northerly bank of a small channel or slough, which channel or slough was between said bank and Island No. 11, that in very low water in the river there was no current and very little water, and that in pools in said channel; that at a medium stage of water in the river, Island No. 11 was above water and there was a current through said channel, and that in very high water Island No. 11 was inundated. The map or plat marked (annexed to the report,) exhibits the channel and the Island. The Island 11, and the channel or slough do not appear in the survey of 1847, or plat thereof.

10th. On the 13th of March, 1856 Island 11 was surveyed by Marshall, deputy surveyor, under instructions from Commissioner of the General Land Office; of February 21, 1854. The filed notes were forwarded and approved by the Surveyor Gensral a copy of the field notes is annexed to the report, page 22.

11th. A plat of the survey of Island 11, and the intervening space to said meander line on the bank of the channel, marked E, is made a part of this report.

12th. That prior to said survey of Island 11, in 1856, the City of St. Paul had, in grading the levee or landing, filled the channel or slough at the upper or west end thereof, and had extended the grade across the Island to the main channel of the river.

The surface of the island, in its natural condition, was about 4 four feet lower than the main land on the opposite side of the channel or slough, and the landing place for boats was always on the south side of the Island, and along the bank or levee west of it—a large majority of the business with the boats having been done west of the Island.

13th. The front part of lots 11 and 12 are on island 11, and the front of the ware house is about 4 feet back from the front of lot 11. The ware-house was built in 1860, and was built to suit the established grade.

14th. The channel or slough was about 28 feet wide. About

39 feet of the ware-house is on the Island, and about 67 feet of it, south of the meander line of lot 1.

Map G accompanies the report and shows the Island, meander line, &c,

15th. Ever since the garding in 1856, the space in front of lots 11 and 12 has been used as a landing for steamboats.

16th. That after the grading had been so done, the railroad company entered upon the said space to construct railroad tracks for permanent use, commencing in fall 1862, and was engaged in the work when this action was commenced, and has completed the construction thereof.

17th. In constructing the tracks the railroad company has so raised the grade upon said levee that the top of the rails is about 21½ inches above the floor in the warehouse, and the north rail is about 50 feet and 3 inches from the front wall. There are two tracks on same level, and the grade from the south track to the river has been made steeper than the former grade.

18th. The railroad and its use obstruct the use of warehouse in its connection with the navigation of the river, and will so continue and cause special injury to defendant in error.

19th. The whole of said railroad works are located upon said Island 11.

20th. The railroad company justifies its entry and works on said levee and Island 11, under and by virtue of these statutes:

1st. The act of Congress granting lands to the Territory to aid in construction of certain railroads of March 3, 1857.

2d. Chapter 1, of act of Territorial Legislature of May 22, 1857.

3d. Amendment of section 10, of article 9, of the constitution of the State of Minnesota, adopted April 15, 1858.

4th. An act concerning land grant railroads, passed August 12, 1858, and an act in addition thereto, passed on the same day.

5th. An act to facilitate the construction of the Minnesota and Pacific railroad, &c., passed March 10, 1862.

6th. An act of Congress to grant the right of way to all rail and plank roads through the public lands of the United States, passed August 4, 1852.

7th. An act to extend the provisions of the last mentioned act to the public lands in the Territories, passed March 3, 1855.

Upon these facts the referee reported his conclusions of law, (pages 16, 17, 18, and 19) in which he held that the meander line of lot 1, section 5, is not a boundary of said lot—that the water course is the boundary—and that Louis Roberts by his purchase and patent became seized in fee of said lot 1 and to the centre of the river, so as to include Island 11, subject only to the public easements in the river and over the street, levee, and landing. Upon the report of the referee the Court made an order perpetually injoining the railroad company and its employees from constructing the road at the locality described in the complaint and from running the cars thereon, and ordered the removal of its works therefrom, and that the plaintiff in error pay the costs. Page 23 of record.

The plaintiff in error appealed to the Supreme Court of the State of Minnesota, from said order decree and judgment. (Page 24.) The appeal was considered by the Supreme Court, and the judgment aforesaid in all things affirmed, and judgment rendered against the appellants for the costs.

From the judgment of affirmance the cause is brought to this Court.

ARGUMENT.

If under his patent Lewis Roberts acquired and held beyond the meander boundary of lot 1, so as to include Island No. 11, and the intervening space, then by his dedication of a part thereof to the City of St. Paul. in 1849, for a public landing, levee and highway, his property in such part passed from him and vested in the City, and he cannot restrain any public use thereof which is agreeable to the City.

The Statutes of the Territory of Wisconsin were in force in the Territory of Minnesota in 1849, and provided that "When the plat or map shall have been made out and cer-"tified, acknowledged and recorded as required by this "Chapter, every donation or grant to the public, * * * "marked or noted as such on said plat or map, shall be "deemed in law and equity a sufficient conveyance to vest "the fee simple of all such parcel or parcels of land, as are "therein expressed, and shall be considered, to all intents "and purposes, a general warranty against such donor or "donors, their heirs and representatives, to the said donee "or donees, grantee or grantees, for his, her or their use, for "the uses and purposes therein named, expressed and in-"tended and no other use or purpose whatever; and the land "intended to be for streets, alleys, ways, commons, or other "public uses in any town or city, or addition thereto, shall "be held in the corporate name, in trust, to and for the uses "and purposes set forth and expressed or intended." Statutes of Territory of Wisconsin, 159; see also organic Act of Minnesota Territory, Statutes at Large, vol. 9, p. 407, sec. 12.

By the dedication the control passed from the proprietor to the City, and if there be any remedy for a disregard of the purpose of the dedication, it must be against the City.

During all the time of the construction of appellant's works

the City authorities had knowledge thereof, and because she did not object she is conclusively presumed to have acquiesced therein, for she cannot stand by whilst great public works are being constructed at enormous expense, connecting the commerce of the interior with the river, and after the expenditure has been made, and the improvements completed, then say that it is an obstruction to a public landing or highway.

But we are not driven to so extreme a position, for the improvements made upon these grounds, and the use made of them are consistent with the duties and obligations of the City under the donation thereof. She received the donation for a public highway, landing and levee; a place where the mingling trade and commerce of the country and the river might be conveniently carried on. The locality should be so improved, if possible, as to accommodate all the wants of commerce at that point; and if trains of cars bringing passengers and freight from a vast region of country, as well as drays and wagons are allowed to load and unload upon it, it will be a proper and judicious use of the property, and a faithful discharge of the trust.

The People et al. vs. Kerr et al. 27 N. Y. Rep. 188. Redfield on Railways, vol. 1, 260–261, Sec. 13. Philadelphia and Reading Railway vs. City of Philadelphia, 47 Penn. St. 325.

By the Act approved March 3d, 1857, Congress made a grant of lands to the Territory of Minnesota to aid in the construction of certain railroads therein mentioned, one of them being "from Stillwater by way of St. Paul and St. "Anthony to a point between the foot of Big Stone Lake "and the mouth of Sioux Wood River." Statutes at Large vol. 11, p. 195. That Act also provided for the transportation of the mails over the roads aided by the grant, and that "the said railroads and branches shall be and remain public highways for the use of the Government of the United States

free from toll or other charge upon the transportation of any property or troops of the United States." Section five being an odd number, and within the limits of the grant, passed thereby, to the extent that at the date thereof it was "not sold or otherwise disposed of" by the United States. By the Act of the Legislature of the Territory of Minnesota, of May 22d, 1857, entitled "an Act to execute the trust created by an Act of Congress, entitled "an Act making a grant of land to the Territory of Minnesota," &c., and by the Act of the Legislature of the State of Minnesota entitled "an Act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the Act of incorporation relating thereto," approved March 10, 1862, the appellant became a corporation with full authority to construct the said railroad "from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River," and the said land grant in aid of that road became vested in the appellant.

By the seventh section of said act of May 22, 1857, it was provided that said railroad might be constructed "upon, "and along, across, over or under any public or private "highway, road, street, plank road or railroad if the same "shall be necessary."

Upon this statement of the law it is confidently claimed that the appellant had the lawful right to construct, and maintain its road over the grounds described in the bill, and answer, and that no nuisance, public or private, was caused thereby. The structure complained of was erected upon public grounds in the prosecution of an enterprize encouraged by Congress, and was expressly authorized by the Territorial and State Legislatures, and permitted and acquiesced in by the city authorities.

The right of way was also given over the public lands by Acts of August 4th, 1852, and March 3d, 1855, 10 U. S. Statutes, 28 and 683; and July 10th, 1862, U. S. Statutes at

Large, Vol. 12, 577. But without reference to the ownership of the soil, the State of Minnesota had the right to authorize the appellant to construct her public work over the land in question, Rex. vs. Smith, 1 Douglass, 425. Lansing vs. Smith, et al, 4 Wend, 1 Gould vs. Hudson River Railroad Co., 2 Selden, 522.

The appellant claimed the lawful right to construct, maintain and use its railroad upon the premises in question, upon two grounds, first, that it owned the land under the Congressional grant of 1857, and the Territorial and State transfers thereof, and possessed the authority to use the same in the prosecution of its enterprize; and second, if such claim were not good, then its structure was authorized by the Territorial and State laws upon the premises dedicated to the public as a landing, street, and highway. Until the validity of these claims of lawful right had been tested at law, and adjudged against the appellant, the owner of adjoining private property could not maintain proceedings for injunction, even though he sustained special loss and inconvenience. In Irwin vs. Dixon and Dixon 9, Howard 10, the complainants owned a warehouse fronting upon the Potomac, with windows and doors opening upon a public highway. The defendants obstructed the doors and windows by the erection of a high fence immediately in front. The defendant's claimed to own the property upon which the fence was erected, and therefore they had the right to maintain the same. The court says, "and when the right or title to the place in controversy, "or to do the act complained of, is, as, here, doubtful, and "explicitly denied in the answer, no permanent or perpet-"ual injunction will usually be granted till such trial at law "is had, settling the contested rights and interests of the "parties. * * * * The true distinction in this class of "cases is, that in a prospect of irremediable injury by what "is apparently a nuisance, a temporary or preliminary in-"junction may at once issue. But not a permanent or

"perpetual one till, the title, if disputed, is settled at law.' Many authorities are cited.

In this cause the appellant claims that at the date of the Congressional land grant, the lands in front of lot 1, Sec. 5, including Island 11, were undisposed of by the United States, and therefore have come to, and vested in appellant under that grant. If this claim be well made then the right to locate the railroads thereon is not questionable. This question involves the consideration of the extent of Lewis Roberts' acquisition under his patent dated March 4th, 1849, p. 37, of record. His patent was for lots 1 and 2 of section 5, "containing ten acres and sixty one hundreths of an acre, according to the official plat of the survey of said lands." As the patent gives no description of the premises except as lots 1 and 2 and the contents, reference must be had to the field notes and plat of the survey to ascertain the location and boundaries. The field notes and plats show that the line running 12.83 south from corner sections 5 and 6 intersects the bank of the Mississippi River, that the meander post was there set, "from which an elm 20 inches in diameter bears north 30½, east 169 links distance; elm 22 inches in diameter bears north 82½, west 161 links distance. Also, that at a point 16.90 east of said section corner the township line intersects the left bank of the Mississippi River, and that a meander post was set with bearing trees white, maple 48 inches in diameter bears west 11 links; white, maple 36 inches in diameter bears north 30, east 6 links distance. The meander line was run, beginning at last mentioned meander post "thence up stream south 61, west 6.50; "south 54, west 6.00; south 46, west 5.00; south 40, west "3.96, to line of sections 5 and 6 at lower end of St. Paul." That line together with the township line at the north and the section line at the west constitutes the boundaries of lot 1 and the area by these lines described was paid for by Lewis Roberts in his purchase from the United

States. Did he take more than that area? The lines that marked and bounded his purchase are described by courses and distances, and also by natural and artificial monuments. The meander posts were upon the left bank of the river, and their location is fixed by the described bearing trees. The river is not a call in the survey, the survey does not extend to the river, but only to the post and described trees upon the bank. Lot 1 in its boundaries does not extend to the river, but only so near as the points where the township and section lines intersect the left bank as fixed by the posts.

In Dunlap et al. vs. Stetson, 4 Mason, 349, a boundary is described as "beginning at a stake and stones on the west bank of the Penobscot River, near a thorn bush, thence to a stake and stones on the same bank of said river, thence running on the western bank of said river to high water-mark, to the first mentioned bounds," was held to carry the land only to high watermark, and not to include the flats below.

In the survey before the Court, lot 1 is described as on the "east side or left bank" of the river, (see plat B,) and the position of the meander posts is established by witness trees, with the same care and certainty that govern the establishment of section corners.

The survey actually made is conclusive of the lands sold and patented. Bates vs. Illinois Central Railroad Company, 1 Black, 204.

1. "The land system of the United States was designed to provide in advance, with mathematical precision, the ascertainment of boundaries."

2. "The survey returned shall be held to be mathematically true as to the lines run and marked, the courses established and the contents returned."

3. ' Each section or separate sub-division of a section, is

independent of any other section in the township, and must be governed by its marked and established boundaries."

4. "The purchaser of land from the United States takes by metes and bounds, whether the actual quantity exceeds or falls short of the amount estimated by the surveyor."

5. "When a navigable stream intervenes in running the lines, the surveyor stops at that point, the fraction thus made is complete, and its contents can be ascertained." Seeven vs. Smith, 7 Porter, 428, (Alabama.)

In McCullough vs. Wainwright, 2 Penna., St. 171, the bank of a stream is defined to be "the continous margin where vegetation ceases, and the shore is the pebbly, sandy, or rocky space between that and low water-mark." Also 3 Sumner, 170. The lines marked on the ground constitute the actual survey and control; and in Pennsylvania it is held error to instruct the jury that land was included in the grant, which was outside the survey marked on the ground. Walker vs. Smith, 2 Penn., St. 43; Yankin vs. Cowan, 34 Penn., St. 198; Hall et al. vs. Tanner, 4 Penn., St. 244.

The boundary lines, including the meander line, not only described lot 1, but also fixed its contents, and upon that the price to be paid by Roberts was ascertained. He paid the price as so ascertained, and took that quantity of land. The officers had no authority to sell him land outside and not paid for, nor to give it to him. See the dissenting opinion of Wilson, C. J., in Middleton vs. Pritchard, 3 Scammon. 519, in which this view is ably maintained.

Island 11, and the space between it and the meander line of lot 1, were not in the survey, not estimated in the area, not regarded in the sum to be paid, neither paid for nor bought.

In Storer vs. Freeman, 6 Mass., 435, the Court in commenting upon the boundary "thence to the shore of the neck," thence by the shore, &c, says, "as it appears from the report of the judge that the shore mentioned in the

deed is not covered with rock, but forms a beach or flats, we shall for *shore* substitute *flats*. The land described will then extend to the flats, and be bounded by the flats. On this substitution the construction is manifest. The land conveyed extends to the flats, but not over them, and the flats being a bound of the land conveyed are not a part of it." In Hatch vs. Dwight et al., 17 Mass., 288, the bank being made a boundary the stream is excluded.

See also the ruling of this Court that the Virginia grant of the territory "northwest of the Ohio River," did not include any part of the river.

Should the Court not adopt this view, but hold that the grant to the meander line upon the bank, is a grant to the river, then the question arises whether the grant extends to the middle of the river and thus includes Island 11? It is submitted that the legislative history of the subject will not allow that position. Congress has not recognised as proper in this country, what is understood as the Common law doctrine in relation to navigable rivers.

The rectangular system of surveys was established by the Act of May 20, 1785, and disallowed a departure from it in any case except where the Indian boundaries might make its adoption impracticable. 1st Pub. Lands, Laws, Instructions and Opinions, 11.

The Act of May 17, 1796, providing for the survey and sale of the lands in the Territory north-west of the Ohio river, I. Stat. at Large, 490, required the same system "unless where the line of the late Indian purchase, or of "tracts of land heretofore surveyed and patented, or the "course of navigable rivers may render it impracticable."

1 Pub. Lands, Laws, Instructions and Opinions, 50. 1 Stat. at L. 490

The policy of omitting the navigable rivers from the surveys is clearly indicated. But Congress did not intend that in providing for the disposal of the lands in a great and important region of the country, it should be left to inference

only that the beds of the navigable rivers were no part of the public lands which were to be sold, and therefore in the 9th Sec. it was provided "that all navigable rivers within the territory to be disposed of by virtue of this Act shall be deemed to be and remain public highways." To make this, if possible, yet clearer, and to prescribe the rights of riparian proprietors upon streams not navigable, it was further provided in the same section, "that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream, and the bed thereof shall become common to both." 1 Stat. at Large, 468. The words "navigable" and "not navigable," are not used in the supposed common law sense, but in the popular sense of their capacity to float vessels of commerce, because in the region over which the law extended there were no streams that could be influenced by the ebb and flow of the tide. In Russel vs. the Brig Empire State, 1 Newbury's Admiralty Reports, 551, Judge Wilkins commenting upon that section, says, "in making a distinction between the streams not and those navigable, where the opposite banks belong to different persons, and enacting that their beds shall belong and be common to both, clearly manifests the intention of the law making power to ordain all rivers actually navigable as common law rivers above the flow of the tide." To provide for the irregular or meander lines that would become necessary under the law, the first section authorized the Surveyor General "to frame regulations and instructions for the government of his deputies," and under like authority the Commissioner of the General Land Office has at all times instructed the deputies how and in what cases to run meander lines.

The provisions of the Act of May 17, 1796, and of February 11, 1805, have by divers other acts been extended to all of the public lands of the United States, and have thus become the foundation upon which our surveying system is reared. It will therefore be useful to consider the important

act of 1803, 2 Stat 229 Lands South of Tennessee.

provisions of those acts more carefully. They provide that the public lands should be divided into townships and sections by lines running north and south and east and west, and that the lines and corners should be perpetuated by suitable monuments and marks upon the field, and that notes and plats of the surveys should be preserved, and that the lines and corners as run and established upon the field should be the boundaries of the townships and sections which they describe, and that the areas should be calculated upon the boundaries so fixed. A departure from rectangular surveys was allowed in three cases only—1st where an Indian purchase; 2d, a tract of land before surveyed or patented, and 3d, a navigable river rendered it impracticable. In these cases irregular surveys were allowed, because straight lines were "impracticable." Why impracticable? Because they could not be extended into an Indian purchase, a tract already surveyed, or patented, or into a navigable river. In each case they were alike and in the same sense impracticable. The lines must stop at the boundary of the Indian purchase, or the tract already surveyed or patented, and at the bank of the river. Thence the irregular lines must follow the boundary of the Indian purchase, or the bank of the river until north and south, or east and west lines again become practicable. It is not necessary in this case to consider the laws providing for the subdivision of sections. It is enough to say that their provisions are entirely consistent with the acts we are considering.

The result of these laws is that the lands of the United States, when offerred for sale to the people, are bounded by fixed mathematical lines, the evidence of which is perpetuated by monuments and marks upon the field, and in the public records; and when at any future time a Surveyor is called to survey a tract of land sold by the United States, the only question with him will be, where were the Government lines run.

Under these Acts, when a survey has been made and approved, it shall be held to be mathematically true in three respects: 1st, the lines run, and marked; 2d, the corners established, and, 3d, the contents returned.

The laws providing for the sale of the public land require their sale to be in accordance with the surveys so made. It thus results that the lands of the United States are conveyed "by fixed boundaries and artificial lines of measurement, and that an exact quantity of acres is sold by the acre, and never in gross."

The usage of the Executive Department has been in accordance with this construction, for the instructions of the General Land Office have required, and the universal practice of deputy surveyors, has been, to corner on the banks of all rivers actually navigable, and to "meander along the top of the same," and the purchasers of fractional sections are only charged for the true quantity of land included within the lines.

If the bank of a river be a call in a survey the grant does not go beyond the bank. Then if a mathematical line upon and along the bank, be a call, how can the grant go beyond it?

See an elaborate review of the surveying system of the United States, in connection with this subject, in Chapter 6, p. 85—Houck on Rivers.

In the Canal Appraisers vs. the People, 17 Wendell 570, on page 599, the court says: "In many cases also the "grants upon the borders of navigable streams have been "so limited as to confine the patentees to the bank of the "stream by the plain terms of the patent itself. Such is "the case, as I understand the testimony of the late Surveyor "General, in relation to all the grants for military bounty "lands which lie upon the borders of navigable rivers. He "says the patent itself only contains the number of the lot; "but that the survey and field notes in his office contain a

"particular description of the boundaries. That where such "lots are situated on the banks of navigable rivers, they are "bounded *on the banks* of such rivers or streams, and run "thence along the *bank* of such stream. This is a clear indi- "cation of the intention of the grantors, that the patent should "not include any part of the *alveus* of the stream or of the "Islands therein. It is therefore a *limited grant*; within the "meaning of that term as used by writers on the civil law, "and it cannot be extended to the thread of the stream, or "include any Island therein, even on the common law prin- "ciple, especially when we take into consideration the fact "that by the public law of the State the patentee was only "entitled to a certain number of acres."

Starr et al. vs. Child et al, 5 Denio, 599.
Haughton vs. Rascoe, 3 Hawks, (N. C.) 21.
Oronderff vs. Steel, 2 Barbour, (S. C.) 126.

The act of March 3, 1803, 2 Statutes at Large, 229 section 17, providing for the survey and disposal of the lands south of the State of Tennessee, and of March 26, 1804, 2 Statutes at Large, 277 section 6, for the disposal of the lands in the Indiana Territory, provided "that all navigable rivers," * * * * "Shall be deemed to be and remain public highways."

By the 3d. section of the Act April 18, 1814, 3 Statutes at Large 125, what is known as the military district in the State of Illinois was "reserved and set apart," to satisfy a certain class of claims, and one of the boundaries is thus described, "thence, west to the Mississippi River, thence down the same to the beginning." In a grant or reservation bounded by a stream not navigable, these words would carry it to the middle of the stream, but Congress held that they went only to the margin; for, at the next session by Act 27, February 1815, 3 Statutes at Large 218, in the 1st. section it was provided that the western boundary "be extended upon the river Mississippi to the middle thereof,

so as to include all Islands in said river between the middle and eastern margin throughout the length of said line."

The purpose that no part of the navigable rivers of the country shall be disposed of to individuals is further shown by the provisions of the Act of April 26, 1816, 3 Statutes at Large 308, providing for the sale of the tract of land at the lower rapids of Sandusky River, and of April 27, 1816, 3 Statutes at Large 319, providing for the sale of a tract of land at the British fort of the Miami of the Lakes, at the foot of the rapids.

In both cases a survey was to be made, and provision was made for the contents of tracts having "a front on the river" or "binding on the river," and it was further provided in each case that the subdivisional lines should not be run so as to extend to or embrace the bed of the river, which was declared a "public highway," It could not have been the purpose of Congress to make the rights of the purchasers for a short distance upon these unimportant streams exceptional, but the object was to prevent an exception, and therefore all doubt was removed by declaring the streams "public highways" or navigable.

The Act of April 24, 1820, 3 Stats. at Large, 566, authorizes the Secretary of the Treasury to prescribe rules and regulations for the subdivision of fractional sections. Under that power the General Land Office directs when and how irregular or meander lines shall be run.

By act of March 3, 1847, 9 Statutes at Large 691, Congress authorized the City of Dubuque to enter the Islands in the Mississippi River opposite said City, which were fractions in sections 19 and 30.

The lands upon the shore had then been entered, and if the proprietors held to the center of the river, the United States had no property in the Islands subject to her grant.

The City of Dubuque has improved the property, and now holds the same by herself or her grantees.

It is worthy of consideration that on the same day that Congress gave this Legislative construction of her policy and her grants, she authorized the sale of the lands in controversy in this case. See Act of March 3, 1847, creating Chippewa Land District, 9 Statutes at Large 179.

It cannot then be questioned that it has been the uniform legislative policy to withhold the navigable rivers of the country from private ownership and control.

The Executive decisions, and practice have been as uniform as has been the legislative policy, upon the subject.

The Commissioner of the General Land Office on the 30 June, 1868, made a decision in the matter of the application of Morgan H. Weir to locate certain scrip upon lands adjoining Lake Muskegon in the State of Michigan, in which he said.

"To the claim of the contestants that the land, if any "exists, belongs to the owners of the adjacent lots, upon the "common law doctrine that the proprietor of either bank of "an unnavigable stream owns to the middle thread of the "same or as usually expressed *ad medium filum aquae*, and "that the proprietor of both banks owns the bed of the river, "it may be replied that even at common law this maxim "never was of universal application, and as understood at the "present day operates only in giving construction to calls "in a grant or conveyance referring in general terms to a "river or stream as a boundary, and where the intention is "not clearly apparent to stop short of the middle of the "stream.

"In all such cases the riparian proprietor is presumed to "own to that line, or if his grant embraces both banks "to own the alveus or bed of the river itself. But it has "never been doubted that the owner may convey the bed of "the river to one person, and the adjoining banks to others. "Lord Chief Justice Hale in his treatise De Jure Maris, &c., "admits 'that one man may have the river, and others the

"soil adjacent,' and that 'the *prima facie* presumption of "ownership of the bed of the 'stream by the riparian pro- "prietor may be rebutted by evidence that the contrary "is the fact.'" * * * * * *

"The proprietor of adjoining lands 'who is also the pro- "prietor of the bed of a river may grant and convey the "bed of the river separate from the land which bounds it,' "see Angell on Water Courses, 4 and 5, Den. vs. Wright, "Peters, C. C. Rep., 64; Wright vs. Wilder, 2 Cush, 199; "Child vs. Starr, 4 Hill. 369. There are at least two clases "of cases, therefore, where the doctrine of ad filum aquae "cannot prevail.

"1st. Where by the terms of the grant it is evident that "another boundary was intended.

"2d. Where the grantor had no power to make a con- "veyance to the middle of the stream. The rule of the "common law may therefore be expressed in the language "of Chief Justice Wilson, in his separate opinion dissenting "from some of the conclusions of the majority of the Court "in the case of Middleton vs. Pritchard, 3 Scammon, 522. 'A "grant of land upon a river extends the title of the grantee "to the middle of the same, if the grantor has authority to "extend it so far, unless limited to another boundary by "express terms.'

"The right of a riparian owner to claim to the middle of "the stream is therefore merely *prima facie*, and may be re- "butted by showing that the calls in his conveyance limit "him to the bank or shore, or that his grantor had no power "to carry him further. * * * *

"Such being the language of text writers and the rulings "of the Courts, it would appear that the maxim, *ad filum* "*aquae* could have no application to sales of lands bounding "on meandered rivers, made by public officers under the "laws of the United States, because such sales are made ac- "cording to regulations prescribed by law and are expressly "limited to lands previously surveyed and platted, and

"any attempt on the part of these officers to sell a single "acre of unsurveyed land would be void for want of "authority. The beds of meandered rivers and lakes are "not surveyed, and the power of the agents executing "sales of the adjacent lands, to carry purchasers to the "middle of the stream would seem to be clearly wanting.

"There can be no question that if the officers of the land "department were to attempt to sell the bed of any mean- "dered stream, the purchaser would acquire no legal title, "even although a patent might issue to him for the simple "reason that the law does not authorize such a sale.

"Now, if this cannot be done directly, for want of au- "thority in public officers, how can it be contended that it "may be done indirectly by a sale of the land adjoining, "when, according to all authorities, the doctrine of *ad filum* "invariably presupposes a power in the grantor to convey "to such boundary and that in the absence of such power "the rule has no application?" * * * * *

"Apply these principles to conveyances made by the Go- "vernment officers, executing a specific trust, limited to the "disposal of surveyed lands, after the same have been regu- "larly platted, numbered, and computed, described in the "patents as embraced between township range and subdi- "visional lines actually run by surveyors, and represented "on the official plats, and the idea of the title of the grantee "extending to the middle of a meandered and unsurveyed "stream would seem to be as effectually excluded as by any "verbal reservation that might be introduced into the in- "strument of conveyance.

"Lands bordering on meandered rivers are frequently "entered by actual settlers under the pre-emption and home- "stead laws, in which the maximum quantity that may be "taken by any one person is limited to 160 acres.

"Will it be contended that such claimants, after having "each selected and entered on the margin the full quantity

"allowed by law and applied for and obtained a patent for "the same, are entitled by some undefined process, to per- "haps, an additional 160 acres of unsurveyed land in the "bed of the river, in defiance of such statutory limitation "Such a construction would appear to give the rule a more "extensive application than it ever has heretofore received.

"Now, when lands bordering on a meandered and unsur- "veyed river, are described in a United States patent as the "southeast quarter of section eight, or as lot A in the south- "east quarter of fractional section 17, township 10, N. R. "sixteen (16) west, meridian of Michigan, it may be cer- "tainly claimed that 'the terms of the grant clearly denote "the intention to stop at the edge or margin of the river,' "for the reason that beyond the margin there are neither "sections, quarter sections, or fractional lots; these terms "being exclusively applicable to the subdivisions of the sur- "veyed land on either side of the stream, and we submit "that the doctrine of the common law, carrying the grantee "of the bank to the middle of the stream, can have no "proper and legitimate application to sales made by United "States officers, of lands bordering a meandered and un- "surveyed river, because all the authorities admit that no "such result follows where the terms of the grant clearly "denote the intention to stop at the edge or margin, or "where the grantor has no power to go beyond; both of "which circumstances combine in conveyances made by the "United States.

"No language could more emphatically denote the inten- "tion to stop at the margin or meandered line than that "used in Government patents for all the terms employed in "the description have reference only to premises surveyed, "platted, numbered and computed, and could not by any "rational construction be applied to the unsurveyed bed of a "river or lake. Nor could there well be a clearer case of "want of power to carry the grantee beyond the margin of "such a stream or body of water.

"So well established is the rule that United States officers "can make no sale or conveyance of land except in persu- "ance of statutory provisions, that the Supreme Court has "repeatedly decided that patents issued without such pre- "requisite authority are entirely void.—See Polk's Lessee "vs. Wendell, 9 Cranch 99. Stoddard, et al. vs. Chambers, "2 Howard, 284. Mills vs. Stoddard, et al., 8 Howard, 345. "United States vs. Stone, 2 Wallace, 525.

"As no law exists providing for the sale of unsurveyed "land, the authority to transfer the title to the bed of a me- "andered river is altogether wanting; and as such bed can- "not pass by a direct transfer, nor as incident or appurten- "ant to a grant of lands on the margin, it is difficult to "perceive by what principle of law the grantee of the bank "could hold to the middle of the stream." * * * * *

"The cases of Middleton vs. Pritchard, 3 Scammon, Illi- "nois Rep., 519, and Morgan & Harrison vs. Reading, 3 Sm. "and M. Miss. Rep., 366, in which it was decided that ripa- "rian proprietors on the Mississippi own to the middle of "that stream are not in harmony with the established prac- "tice of the Government, for ever since the organization of "the public land system, it has claimed and exercised "right of surveying and disposing of islands in the Mis- "sissippi and its navigable tributaries, and all other navi- "gable waters in the public land States and Territories of "sufficient size to justify the expense.—See Chief Justice "Wilson's separate opinion hereinbefore mentioned.

"Sometimes these islands have been disposed of with the "lands on the margin, but more frequently they have been "surveyed and sold long afterwards." * * * * * * * * * * * "The tendency of the latter decisions "however, appears to be that the common law rule is inap- "plicable to such large navigable rivers as the Mississippi, "and many of its tributaries, and the rulings of the Courts "are beginning to coincide more nearly with the decisions "and practice of the General Land Office."

In his report of 1867, the commissioner of the General Land Office elaborately reviewed the authorities, and the practice of the Government on this subject.

It has been the uniform practice to survey and sell the Islands in our great rivers, and in most cases, as the commissioner says, after the shore lands had been disposed of.

It is submitted that, upon this subject, the authority of the Legislative and Executive Department is very emphatic, and that in relation to lands sold under that provision of the Constitution which authorizes Congress to prescribe rules and regulations for the disposal of the public lands, that authority ought to be conclusive upon that judiciary.

But the attention of the Court is asked also to the judical decisions.

The English rule is not one of property, but a rule of evidence. In England as in the United States, public user for the purposes of commerce is the only conclusive test in the absence of legislative declaration.

In his work on the "Law of Waters," p. 42—edition 1851, Woolrych says. "The circumstance, therefore, of the flow and reflow of the tide is one of the strongest in support of a public right, but so far from being conclusive, we have mentioned a case in which such a test has been found to be fallible. Public user for the purpose of commerce is, consequently, the most convincing evidence of the existence of a navigable river and that fact being established, the accompanying rights of fishery and of ownership of soil, &c., are easily defined."

The Mayor of Lynn vs. Turner, 1 Cowper's, R. 86, was an action upon the case against the corporation for not repairing and cleansing a creek called Dowshill fleet "into which the tide of the sea was accustomed to flow and reflow as from *time immemorial* they had been used," whereby the creek was rendered unnavigable, and the plaintiff was obliged to carry his corn round about." Mr. Balwin conten-

ded that the *locus in quo* is a navigable river where the tide flows and reflows," and said: "For wherever a river flows and reflows it is in the nature of a highway and is common to all." Lord Mansfield interrupting him, said "*Ex facto oritur jus.* How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows, that are not navigable rivers, and the place in question may be a creek in their own private estate." The judgment was affirmed upon the allegation that the corporation was bound by prescription.

In the King vs. Montague et al. 4 Barn. & Cres. 598, the inquiry was important whether there had been "public navigation" upon Yantlet Creek, which united the Thames and the Medway. Bayley, J., after citing the case of the Mayor of Lynn vs. Turner, and the opinions of Gibbs, C. J., and Heath, J., in Miles vs. Rose, 5 Taunt 706, to the effect that the flowing of the tide is strong prima facie evidence of a creek being a public navigable river, said, "The strength of this prima facie evidence arising from the flux and reflux of the tide must depend upon the situation and nature of the channel. If it is a broad and deep channel calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation, but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever had been a public navigable channel."

Under the English rule then, the inquiry is, whether a stream is of sufficient width and depth for purposes of navigation, and has it been used for such purposes? And upon that inquiry the flow and reflow of the tide is strong affirmative evidence, but not conclusive. Houck on Rivers, Chap. 2, p. 10.

In the United States, so long as the settlements were con-

fined to the Atlantic coast, the rule of evidence was the same, for the reason that in most cases the rivers were not navigable above tide water, but in respect to the great rivers west of the Alleghany Mountains, the rule, as one of evidence, is materially modified. There, as far as the tide ebbs and flows, the presumption remains that the streams are navigable, but above that point, the presumption that they are not navigable is at once overcome or excluded by the magnitude of many of the streams, their great breadth and depth, and their palpable capacity for navigation, and their constant and great use as novigable rivers.

The case of Jones vs. Soulard, 24 Howard 41, has by some been regarded as adverse to this view. This question was not necessarily considered, nor does it seem to have been considered by the Court in that case. The question was whether the municipal corporation of St. Louis, under the proceeedings of incorporation of 1809, and the boundaries as fixed, extended to the center of the Mississippi river, and it was so held. The title to the property in controversy necessarily followed the decision of that question, not because it was incident to any riparian rights, but because it was within the limits of the city, vacant and unclaimed, and therefore within the provisions of the grants made by the Acts of Congress of June 13, 1812, and January 27, 1831. Had the right to the property been dependent upon any riparian ownership, then it is probable it would not have been unclaimed, and would not have been the subject of Congressional grant, but would have belonged to the owner of the shore in front of which it lay.

Pennsylvania has uniformily rejected the common law rule as inapplicable to the great rivers of this country, and held that if navigable in fact, and their use necessary to the commerce of the country, they belong to the public, and cannot become private property. Carson vs. Blazer, et al., 2 Binney, 475; Shrunk vs. The President, Managers and

Company of the Schuylkill Navigation Company, 14 Sergeant and Rawle, 71.

Navigable streams and the beds which they occupy are public property, and the owner of land on navigable streams above tide water has title to ordinary low water mark, and not to the centre of the stream. Elder vs. Burrows, 6 Humphrey, (Tenn.,) 358. "Every water course in this State suited to the ordinary purposes of navigation, whether it ebbs and flows or not, (where the Government has not expressly granted any part of the bed thereof, or computed it in the quantity granted,) is a public highway," and no private right to the bed thereof can be asserted below the low water mark. Bulloch vs. Wilson, 2 Porter, (Alabama,) 436.

Navigable waters extend not only to low but embrace the soil to high water mark. Mayor and Aldermen of the city of Mobile vs. Eslava, 9 Porter, 577; Bowman's Devisees and Brunly vs. Wathen et al., 2 McLean, 376.

The protracted struggle over this question in New York, is now settled by the decision in the case of The People, ex rel., Loomis vs. The Canal Appraisers, 33 N. Y. Rep., 461. The reasoning of Davies, J., is so conclusive, and the authorities invoked by him are so weighty that, hereafter in that great State it will not be questioned that rivers navigable in fact, and important to commerce are public, and cannot become the subject of private right and private control, unless in the case of an unquestionable public grant.

The attention of the Court is asked to the great case of McMannus vs. Carmichael, 3 Clark, (Iowa,) 1—of which a writer in one of our law periodicals has recently said: "This course undoubtedly surpasses, in breadth of view, depth of research, and philosophic treatment, any case thus far decided in this country bearing upon this subject. The opinion of Mr. Justice Woodward, is a monument of legal learning. The Court holds the Mississippi river a navigable stream, in the highest and broadest sense, giving to the va-

rious treaties and the surveying laws of the United States, due weight for the first time."

In Spooner vs. McConnell, et al., 1 McLean, 337, Justice McLean, in commenting upon the 9th section of the act of May 18, 1796, which declares that all navigable rivers shall be and remain public highways, says: "And all the surveys made on such rivers were bounded by them, and that the beds of the rivers were never included in the surveys nor sold to individuals."

In Bowman's Devisees and Brunley vs. Watham, et al., 2 McLean, the same learned judge says: "We apprehend that the common law doctrine, as to the navigableness of streams, can have no application in this country; and that the fact of navigableness does, in no respect, depend upon the ebb and flow of the tide."

In Woodman vs. Kilburn, et al., 6 American Law Reg., (N. S.,) 238, 241, Judge Miller, of the District Court of Wisconsin, said: "The Wisconsin is a meandered stream, according to the Government survey of the public lands. Although it is not navigable, in its unimproved condition, above the site of the dam, for steamboats navigating the Mississippi river, yet it is navigable in the common sense of the term. The soil in the bed of the river is not granted to riparian purchasers *usque ad filum*, but the body of the stream is reserved to the public."

At the common law the test of admiralty jurisdiction over rivers was the ebb and flow of the tide, but in this country that test has been discarded, and admiralty jurisdiction is held to extend to all rivers in fact navigable in the popular sense. The propeller Genesee Chief, &c., vs. Fitzhugh et al., 12 Howard, 443; The Hive vs. Trevor, 4 Wallace, 555. In England there are no rivers that are navigable in fact above the ebb and flow of the tide, and there tide water and navigable water are synonimous, and the presence or absence of tide water in the rivers decides the questions of navigability.

But, in the case of the Genesee Chief, the learned Chief-Justice said: "Now there is nothing in the ebb and flow of the tide that makes the waters peculiarily suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, in which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same, and if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it." Are these decisions and the reasoning upon which they rest not conclusive upon the question now before the Court? The convenience and necessities of commerce have established the rule in England that the navigable rivers shall not become the subject of private right, but shall be and remain common, free, and public. The attention of the Court is asked to an able discussion of the question and review of the American authorities by a late writer, in chapter 3, p. 26, Houck on Rivers.

All the wants of commerce found upon the tidal rivers are also found upon the fresh water streams, provided their waters are sufficient to float its vessels. Perhaps it would not be an exaggeration to say that the commerce upon our rivers not tidal, is of far greater importance in its value, tonnage, and number of vessels and men employed, than was all the commerce of England at the time the salt water rule was first announced. The language of Chief-Justice Taney, above quoted, has its full force in this connection.

The shore, the bed and the flowing waters should be as as free from the embarrassments, incident to the assertion of private rights above as below the extreme points of tidal influence.

"The boundary of land covered by the water of the sea on tidal rivers is the line co-inciding with the average heighth of all ordinary tides, equinoctial as well as others, taken

throughout the year, excluding only extraordinary catastrophes or overflows."

Phear on rights of water, 41.

"It is, too, perhaps not free from doubt, whether the land covered by non-tidal rivers which are navigable, and by large fresh water lakes, does not by common law belong to the crown." Same, 13.

THOS. A. HENDRICKS,

Attorney.

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Supreme Court of the United States.

ST. PAUL & PACIFIC R. R. Co., *et al.*, PLAINTIFFS IN ERROR,

vs.

C. H. SCHURMEIER, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

POINTS AND AUTHORITIES BY THE COUNSEL OF DEFENDANT IN ERROR.

STATEMENT.

The defendant in error, Schurmeier, brought this action in the district court, Ramsey county, Minnesota, for a perpetual injunction against the plaintiffs in error, the St. Paul & Pacific R. R. Co., to restrain it from entering upon and taking permanent and exclusive possession of the street and public landing immediately in front of and between his premises and the Mississippi river, and erecting thereon its railroad bed and track and running its cars thereupon, and thus permanently obstructing and practically destroying the street and public landing between the complainant's premises and the river.

The railroad company justified their entry, and exclusive possession and permanent occupancy, on the ground that it was the owner in fee of the *locus in quo* under the railroad land grant from the United States of May 22, 1857, and the subsequent acts of the legislature of Minnesota.

All the issues were tried in the district court by a referee, who found the facts and the law in favor of the complainant, Schurmeier. No *case* or bill of exceptions was made, and hence the *facts* found by the referee are undisputed. The case was removed by the railroad company to the supreme court of the State, where the conclusions of

law found by the referee were elaborately reviewed, and, finally, fully affirmed.

From this judgment of affirmance, the case is now before this Court.

Of course, all the equities of the complainant's bill were finally and conclusively adjudicated by the supreme court of the State of Minnesota.

There is but one question in the case that can be reviewed in this Court:

It appears from the proceedings of the referee (Record, p. 11, *et seq.*) that the complainant's premises are situate upon a fractional section, duly surveyed by the United States Government surveyor on the 27th day of October, 1847, and which survey was duly approved on the 15th day of March, 1848, and duly returned to the General Land Office. This fractional section was designated by this survey as lot 1, in section 5, township 28, north of range 22, west of the fourth principal meridian. It was represented by the survey, and the plat and maps thereof, as lying upon and being bounded on its southern side by the Mississippi river. It was this river that interposed and made this section a fractional one.

The northerly line of this section, running east till it intercepts the river, and the westerly line of this section running south till it intercepts the river, are all the boundaries this fraction of a section had, or could have, except the watercourse or river itself. It was thus surveyed, platted, and mapped. It was bounded on the north by the east and west sectional line; on the west by the north and south sectional line, and on the only other remaining side by the Mississippi river.

As thus surveyed, platted, and mapped, it was duly sold by the United States Government to Lewis Roberts, and afterwards, on the 24th day of March, A. D. 1849, was duly granted and conveyed to said Roberts by the United States, by patent on that day issued.

In the spring of the same year (1849) Roberts surveyed, laid out, and platted the whole of this fractional parcel, as well as other property, into towns, blocks, lots, streets, &c., constituting a part of the town of St. Paul, and caused said plat to be duly recorded. On this plat the complainant's premises were designated as lots 11 and 12, in block 29, and all the space in front of this block, and between this

block and the river, was designated as "landing." This plat, with these designations, has ever since continued and remained in force.

The complainant has all of Roberts' right, title, interest, and estate in the premises.

Ever since the city of St. Paul was organized under the city charter, which was in March, 1854, it has exercised municipal control and dominion over the said space designated as "landing," establishing a grade therefor, and causing the same to be partially graded, and maintaining the same as a landing.

From the time of the marking of said town plat by Roberts until grievances complained of, the said space designated as "landing" was used as a public landing or levee for steamboats and vessels touching at St. Paul.

It further appears from the referee's findings that, at the time of aforesaid Government survey of this fractional parcel, there was a sort of sand-bar, reef, or "tow-head" lying along the shore of the river, several feet lower than the main land of the fraction, and with a slight depression between it and the main land. This depression was about 28 feet wide, and the bar or reef, in its extreme width, was about 90 feet, and in its extreme length about 160 feet.

In high water this sand-bar was completely under water; in medium water it was exposed to view, and the water flowed through the depression, making of it a sort of slough; and in low water there was no flow of water through the depression

In the aforesaid Government survey, no mention of or reference to this sand-bar or reef was in any way made in the field notes, plat, or map. The fractional parcel was represented as lying immediately upon and bounded by the Mississippi river. Roberts, the patentee, in surveying and platting this fraction into the town of St. Paul, included the sand-bar and the intervening depression in his plat, and as a part of his grant under his patent; and the southerly one-third of the said lots 11 and 12, in block 29, of said plat, and the whole of said "landing," are situate upon this depression or slough and sand-bar.

It appears, however, that the surveyor, in meandering the course of the river along this fraction, run the meander lines along the main land of the shore, and not along the southerly line of this sand-bar, and thus did not include the space occupied by this depression and

sand-bar in his estimate of the *quantity* of land contained in this fraction.

It further appears that afterwards, in March, 1856, and after this depression had been filled, and the whole space between the lots and the river, including the depression and the sand-bar, had been graded by the city, and all traces of the depression and sand-bar had been substantially effaced, the space originally occupied by this sand-bar was surveyed by a United States Government surveyor, and platted and mapped as "Island No. 11" in said section 5.

It is by virtue of this survey that the plaintiffs in error claim title and ownership of this so-called island under the Congressional land grant of May 22, 1857, and also the right to the exclusive occupapation and use of the same.

It would appear, therefore, that there is but one possible question in this case open to the consideration of this Court: What did Louis Roberts, by his patent from the United States issued on the 24th day of March, 1849, take?

POINTS AND AUTHORITIES.

I.

The patent to Roberts *calls* for "lots numbered one (1) and two, (2,) of section 5, in township 28, north of range 22 west, in the district of lands subject to sale at the Falls of St. Croix, Wisconsin, containing ten acres and sixty-one hundredths of an acre, *according to the official plat of the survey of said lands* returned to the General Land Office by the surveyor general."

This description, as to lot No. 1, clearly *calls* for a parcel of land *bounded* on the north by the east and west fractional line, and the west by the north and south fractional line, and on the only other remaining side by the watercourse, that is, the Mississippi river; for with these *boundaries* it was duly surveyed, platted and mapped, and such survey, plat and map were duly approved and returned to the General Land Office, and according to such survey, plat and map it was duly patented as aforesaid.

The patentee, therefore, must take all the land included within these *boundaries*.

But it is understood that the plaintiffs in error claim that the

southerly boundary of this parcel of land is not the water course or Mississippi river, but the *meander line* which the surveyor run along the course of the river for the purpose of determining the *quantity* of land to be returned as being in this lot or fraction of a section; and hence that the patentee took only the land lying north of the meander line.

This claim of the plaintiffs in error seems to be utterly without any basis whatever, either in fact or law.

In the United States Government surveys the *boundaries* are the north and south, and east and west lines of the sections and townships, and in the case of fractions, also the natural or exterior object which causes the fraction, as a watercourse, Indian territory, &c. The *monuments* are the section posts and quarter-section posts.

The "meander lines" are *not* boundaries. They are not even *known* to the laws or acts of Congress. The term "meander" is simply used to designate certain lines run by the surveyors along the windings of watercourses bounding fractions, for the purpose of ascertaining and returning the quantity of land in such fractions.

The acts of Congress explicitly define "monuments," and provide where they shall be placed.

They are to be set down at the township, section and quarter-section *corners*.

And these acts provide that from these monuments *all lines* shall be run, *north or south*, and *east or west*, until other like monuments or their places shall be reached, or until some watercourse or other exterior object intervenes.

There is no provision whatever for meandering a watercourse, or running any line along its bank or the thread of its stream. But the *quantity* of land in a fraction must be returned; hence the surveyor runs lines along the bank of the watercourse to determine the quantity of land in the fraction.

Brightly's Dig., p, 466, sec. 41.
Brightly's Dig., p. 493, sec. 208.
Lester's Land Laws, p. 709.

If the surveyor make an error in his return as to the quantity of the land, or if the quantity is erroneously stated in the patent, this will not affect the grant. The grantee will take according to the

boundaries of the land described. (Lindsey *vs.* Hawes, 2 Black, 554.)

The survey, including the maps, plats, field notes and certificates returned into the Land Office, and pursuant to which the grant is made by the patent, is a matter of record, and of equal dignity with and a part of the patent. (See case last above cited; also Bouv. Dict., vol. 2, p. 566, *term "survey," and authorities there cited.*)

The Government is *concluded* by the survey according to which the grant is made. Any subsequent survey of the land by the Government made after the grant is void and without effect as to the grantee.

Lindsly *vs.* Hawes, 2 Black, 554.
Bates *vs.* Illinois Central R. R. Co., 1 Black, 204.

So any survey not made in pursuance of the acts of Congress is void. (Lessee of Brown *vs.* Clements, 3 Howard, 650.)

It is clear, therefore, that Roberts' patent "calls" for the *Mississippi river* as one of the *boundaries* of his grant.

Now, it is happily beyond question, that a call for a river or watercourse as a boundary is a call for the *thread* of the stream or centre of the channel; and hence that such riparian proprietor owns to the thread of the stream, subject, however, to the easement of navigation by the public when the river or watercourse is navigable.

Boundaries, designated as "up" or "down" the river, or "along" the river, or "by" the river, mean the *thread* of the river or centre of the channel. Boundaries running *to* the river, or to the bank of the river, run to the thread or centre of the channel of the river.

A river or watercourse, when used as a boundary, is used as an entirety.

Angell on Watercourses, chs. 1 and 13.
Middleton *vs.* Pritchard, 3 Scammon, 510.
Ex parte Jennings, 6 Cowen, 518 and note, p. 536.
Gavit *vs.* Chambers, 3 Ohio, 496.
Newson *vs.* Pryor's Lessee, 7 Wheat, 7.
Jones *vs.* Saulard, 24 Howard, 63.
Bates *vs.* Ill. Central R. R. Co., 1 Black, 204.
3 Kent, p. 427, Lecture 52, subdivision 2, (2) Riparian Rights.
C. H. Schurmeier *vs.* St. Paul & Pacific R. R. Co., 10 Minnesota R., 82, (the case at bar.)

It is conceived that the decision of the supreme court of Minnesota in the case at bar (see last case above cited) on this question settles the law for that State, and is also conclusive on this point in this Court.

The court there holds that a call for the Mississippi river for a boundary is a call for the middle *thread* of the stream, or *centre* of the channel; and having in the case at bar arrived at the conclusion that the Mississippi river was one of the *boundaries* of Roberts' grant, the court further decided that by such boundary Roberts took to the *middle thread* of the stream, or the centre of the channel of the river.

We suppose that the decision of the supreme court of Minnesota upon the question of *boundary* is reviewable by this Court in this case. That is to say, this Court has jurisdiction to determine whether the southerly boundary line of Roberts' grant was the Mississippi river or the *meander* line.

But we do not suppose that the decision of the supreme court of a State as to what line the boundary of a watercourse calls for is properly reviewable by this Court. It is for the supreme judicial tribunal of each State to determine and settle this rule of property within its jurisdiction, and it is presumed that this Court will adopt and follow such rule within the same territorial jurisdiction.

But really this is not conceived to be a practical question in the case at bar; for this Court has determined and settled this rule of property in precisely the same way as the supreme court of the State of Minnesota has, and in a case very similar in this aspect to the one now under review.

We refer to the case of Jones *vs.* Saulard, in 24 Howard, above cited. This Court there distinctly holds that a call for the Mississippi river as a boundary is a call for the centre of the channel.

But it is further worthy of remark in this connection that the supreme court of Minnesota, in their decision of this case, call attention to the fact that even if the other rule of property were to be adopted, and the riparian proprietor was only to be allowed to take to the *low-water* mark, yet, even under this rule, Roberts' patent would include the land claimed by the plaintiffs in error, and designated as "Island No. 11," the *locus in quo* in this case. (See Schurmeier *vs.* St. Paul and Pacific R. R. Co., p. 99.)

It is plain, then, that the land claimed by the plaintiffs in error had passed from the United States to Roberts, and became *absolutely rested* in him long before the survey under which the plaintiffs in error claim was made, and long before the land grant act was passed by Congress, and hence that the plaintiffs in error could take no part of the premises in question by virtue of this survey of 1856, and the Congressional land grant of 1857.

The plaintiffs in error therefore entirely fail to justify their entry upon and occupancy of the *locus in quo* in this case, by virtue of any title or estate which they have therein, and this is the only justification presented by their pleadings.

II.

But let us assume for purposes of this case that the fee to the premises in question passed to the plaintiffs in error under the Congressional land grant, precisely as claimed by them.

What then? The land clearly would be held by them as it would be by any other grantee from the United States, *subject to the easement of a public landing*.

Now, the plaintiffs in error have no authority under any act of Congress, or grant from the United States, nor under their charter, nor any other act of the legislature of Minnesota, to take exclusive occupation of these premises, nor in any wise to obstruct this public landing.

Their occupation, therefore, is in no sense or aspect a legalized obstruction, and hence it is a public nuisance; and the defendant in error, being *specially* injured thereby, had a right to his bill to have the nuisance *abated*.

And so the supreme court of Minnesota has decided in this case.

Now, this conclusion of the supreme court of Minnesota is arrived at, whichever way the question of boundary of Roberts' grant may be decided, and even assuming that the plaintiffs in error have taken all they claim to have taken under their land grant.

The decision of the supreme court of Minnesota, therefore, upon the question of *boundary* in this case, does not *necessarily* affect the final judgment which they reached and rendered in the case.

Their judgment, on the very grounds set forth in their opinion, must necessarily have been the same upon the entire merits of the case, even if they had decided the question of the boundary of Roberts' grant, and the consequent question of title in the *locus in quo*, *in favor* of the plaintiffs in error. Had they so decided this question, it will not be pretended that the cause could have been removed to and reviewed by this Court.

And since it appears that their decision of this question does not *necessarily* affect the final conclusion reached, and judgment rendered by that court, this Court will not disturb such judgment.

Finally, it is worthy of remark in this connection, that although the supreme court of the State of Minnesota has decided that the plaintiffs in error have no authority under the State of Minnesota to erect the obstructions complained of, and that this decision is conclusive of this case, it is nevertheless *not in the power* of the legislature of Minnesota, even if they were so disposed, to authorize these obstructions upon the public landing of a great national highway of commerce like the Mississippi river. The people of Wisconsin, Iowa, Illinois, Missouri, and other States of the Union, have just the same interests and rights in the freedom of the navigation of this river and the unobstructed use of its banks and public landings within this State as the people of Minnesota. Any attempt, therefore, on the part of the people or the legislature of Minnesota to the exclusive use and occupotion of the banks and landing-places of this river within the territorial jurisdiction of the State would be wholly inadmissible. If the several States could each, within its jurisdiction, assume the exclusive use and occupancy of the banks of the great navigable streams flowing through their territory, or could grant such exclusive use and occupancy to others, there would be an end to the freedom of the navigation of these streams. In fact, they would no longer be *navigable* streams, as the acts of Congress explicitly declare they shall be.

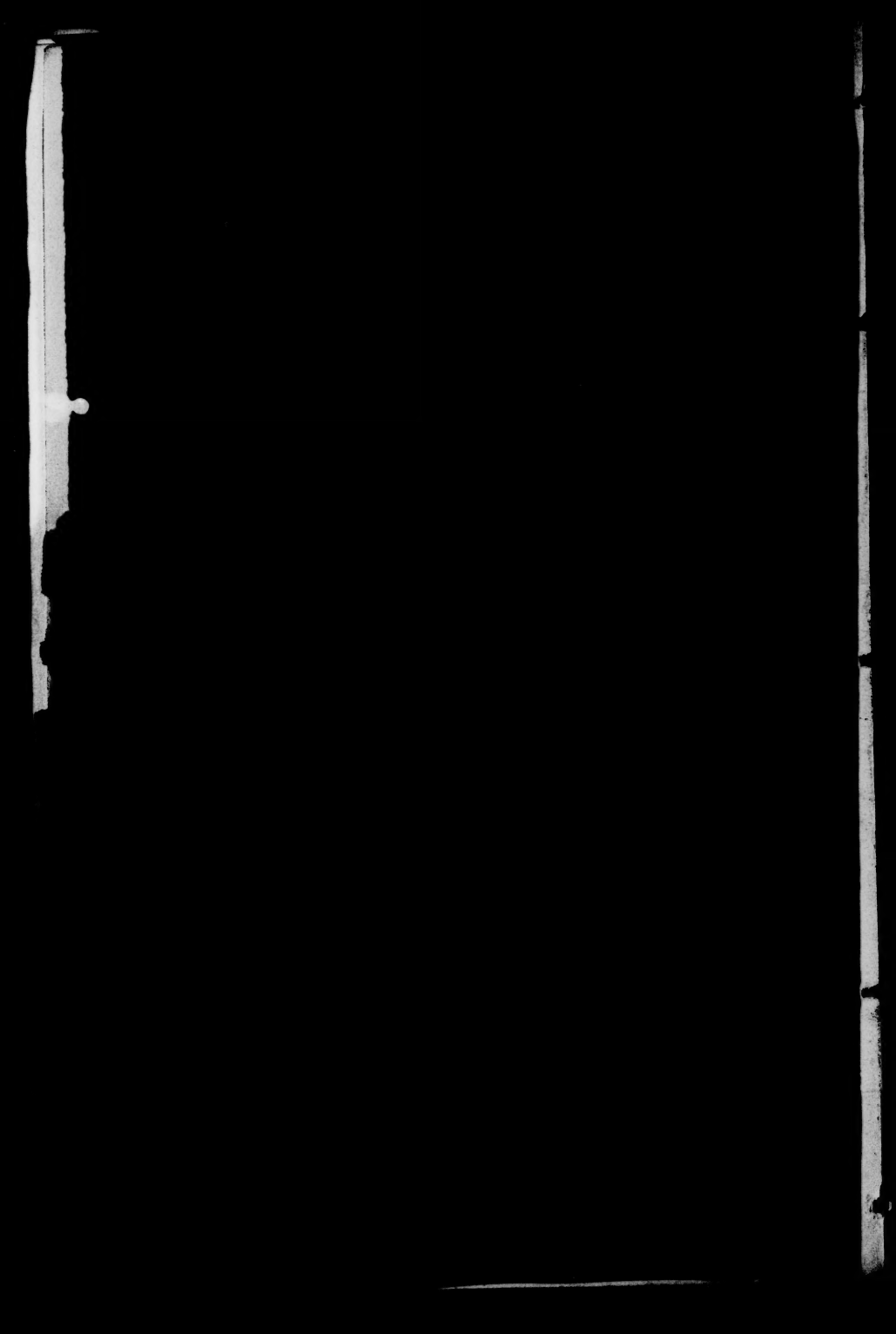
Constitution of the United States, art. 4, sec. 2.

Ordnance of 1787, art 4, last clause.

Act of Congress of 18th May, 1796, sec. 9, 1 Statute at Large, 468.

Brightly's Digest, p. 500, sec. 232.

In no aspect of the case, therefore, can the obstructions complained of be other than a public nuisance, and one, too, from which the defendant in error must, in the nature of things, always suffer special injury.

The judgment of the supreme court of Minnesota must be affirmed, or the writ of error dismissed.

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